IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 23, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioners, Aberdeen and Rockfish Railroad Company *et al.*,[1] pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on July 25, 1978 in proceedings styled *Aberdeen and Rockfish Railroad Company* v. *Interstate Commerce Commission and United States of America*, No. 78-1636.

DECISION BELOW

A panel (two judges) of the United States Court of Appeals for the District of Columbia Circuit granted without opinion a motion to dismiss a petition for review of the Decision and Order of the Interstate Commerce Commission (the Commission) served June 29, 1978 in

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[1] The entire list of railroads which join in this Petition appears as Appendix A.

proceedings styled *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977.*

The order of the Court of Appeals dismissing the petition for review is attached as Appendix B and the Decision and Order of the Commission as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered on July 25, 1978, and this petition has been filed within 90 days of said date.

QUESTION PRESENTED

Did the Court of Appeals err in granting a motion to dismiss a petition for review of an order of the Interstate Commerce Commission in which the Commission (1) interpreted the important, new rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 as necessitating a de-emphasis of the role of the general increase in railroad ratemaking, and (2) as a consequence of that interpretation, selected for investigation and ultimately directed the railroads to rollback the increase (previously allowed to go into effect) in the rates on seven specified commodity groups?

STATUTES INVOLVED

The statutory provisions primarily involved are Sections 101, 202, 205, and 206 of the Railroad Revitalization and Regulatory Reform Act of 1976. Those provisions are set forth in full in Appendix D hereto.

This proceeding also presents issues arising under the Fifth Amendment to the Constitution of the United States which provides in relevant part that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

On September 26, 1977, virtually all of the nation's raliroads (Petitioners here) petitioned the Commission for authorization to increase their freight rates from, to, and within all territories by five percent, effective November 30, 1977, in order to offset increases in the cost of labor, materials, and supplies. In an order served September 29, 1977, the Commission authorized the filing and publication of a tariff of increased rates with appropriate refund provision, to become effective no earlier than November 30, 1977, and no later than December 30, 1977, subject to protest and possible suspension. The Commission also provided for the filing of protests and replies thereto.

Following the submission of protests and replies and after oral argument, the Commission served an order on November 10, 1977 in which it found that without a five percent increase in rates sufficient funds will not be available to the railroads to defray the cost escalations experienced by them. The Commission therefore declined to exercise its authority to suspend the 5 percent general increase. The Commission did however institute an investigation into the lawfulness of the increase as it applied to the following commodities: (1) newsprint paper, (2) sodium alkalies, (3) industrial gases, (4) sulphuric acid, (5) rubber (natural or synthetic), (6) manufactured iron or steel, and (7) recyclables. That investigation was based upon allegations that in the case of each of the specified commodities more than half the revenue earned is associated with movements which returned revenue in excess of 180 percent of variable cost. At the same time, the Commission directed all parties to submit briefs on the question of the interrelationship of the special rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) and railroad general increase proceedings.

On June 29, 1978, the Commission concluded its investigation of the lawfulness of the 5 percent increase as applied to the seven specified commodity groups and its consideration of the interrelationship of the rate provisions of the 4-R Act and general rate increase proceedings. In a Decision and Order served on that date, the Commission (1) concluded that the special ratemaking provisions of the 4-R Act necessitate a de-emphasis of the role of the general increase in railroad ratemaking and (2) granted the railroads authority to establish increases in the rates on the seven specified commodities rates from 2 to 3 percent and directed them to make appropriate refunds in view of the 5 percent increase which it had allowed to go into effect.

On July 10, 1978, Petitioners filed in the Court of Appeals their petition for review of the Commission's June 29, 1978 Decision and Order, together with a motion for stay pending review. The Commission and certain shipper groups opposed the motion for stay pending review and, in addition, filed motions to dismiss the petition for review.

On July 25, 1978, the Court of Appeals granted the Respondents' motion to dismiss the petition for review.

Whether or not the Court of Appeals erred in dismissing the petition for review is the question now presented to this Court.

REASONS FOR GRANTING THIS WRIT

The Court of Appeals provided no explanation for its dismissal of the petition for review; it indicated only that it was granting Respondents' (United States and Interstate Commerce Commission) motion to dismiss. That motion was predicated on a long line of cases, starting with *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935) and most recently reflected in *Council of Forest Industries of British Columbia* v. *Interstate Commerce Commission*, 570 F.2d 1056 (D.C. Cir. 1978), holding that Commission orders in general rate increase proceedings are not reviewable at the behest of shippers complaining of the application of the increase to the rates on individual commodities; those shippers must first exhaust the remedies available to them under Sections 13 and 15 of the Act. Those cases, however, have no application whatever to the railroads' petition for review of the Commission's Ex Parte 343 order and the Court of Appeals' dismissal of that petition, to the extent that it was based on the *Algoma* cases, was clearly in error.

The railroads' petition for review, as their related motion papers made clear, challenged the Commission's Ex Parte 343 order on the grounds that it contained an interpretation of the new and important rate provisions of the 4-R Act which is clearly erroneous and which threatens the ability of the railroads to respond in the only way that they can to the inflationary impact of the economy, that the Commission failed adequately to explain its departure from prior norms, and that the Commission in its procedure for investigation of the selected commodity groups acted arbitrarily and deprived the railroads of due process of law.

I.

THE *ALGOMA* CASES PROVIDE NO BASIS FOR DISMISSAL OF THE RAILROADS' PETITION FOR REVIEW

The Court of Appeals gave no reasons for dismissing the petition for review. It did however state that it was granting the Respondents' motion to dismiss—the motion of the United States and Interstate Commerce Commission.[2] Respondents' motion rested on the recent Court

[2] Certain shipper groups filed motions to dismiss contending that the petition failed to contain a concise statement of the grounds

of Appeals decision in *Council of Forest Industries of British Columbia* v. *Interstate Commerce Commission*, 570 F.2d 1056 (D.C. Cir. 1978). There, a shipper group sought review of a Commission order authorizing a general increase in rates insofar as that increase applied to the rates on a particular commodity. Specifically, the shipper group contended that Commission authorization of a seven percent increase in the rates on lumber from points in Western Canada, without at the same time authorizing a seven percent increase in the rates applicable to lumber at allegedly competing points in Washington and Idaho, was discriminatory. The Court of Appeals, relying on *Algoma Coal & Coke Co.* v. *United States*, 11 F.Supp. 487 (E.D. Va. 1935), and subsequent cases,[3] held that review of Commission orders in general increase cases is not available when petitioners are seeking review of the application of that increase to the rates on particular commodities:

> ". . . because these issues are not appropriate for consideration in general proceedings, are not addressed by the ICC, and remain open for determination in individual proceedings under Section 13(1) and 15(1)" (570 F.2d at 1062).

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on which relief is sought. Such motions are plainly without merit; a petition for review need only describe the order and ask for review of it. Federal Rules of Appellate Procedure, Appendix of Forms, Form 3.

[3] Subsequent cases are *Niagara Mohawk Power Corp.* v. *United States*, 405 F.Supp. 845 (S.D.N.Y. 1975); *Electronics Industries Ass'n.* v. *United States*, 310 F.Supp. 1286 (D.D.C. 1970), *aff'd* 401 U.S. 967 (1971); *Alabama Power Co.* v. *U.S.*, 316 F.Supp. 337 (D.D.C. 1969) and *Atlantic City Electric Co.* v. *U.S.*, 306 F.Supp. 338 (S.D.N.Y. 1969), both *aff'd* by an equally divided court, 400 U.S. 73 (1970); *North Carolina Natural Gas Corp.* v. *U.S.*, 200 F.Supp. 745 (D.Del. 1961); *Bison Steamship Corp.* v. *U.S.*, 182 F.Supp. 63 (N.D. Ohio 1960); *Luckenbach S.S. Co.* v. *U.S.*, 179 F. Supp. 605 (D.Del. 1959); *Coastwise Line* v. *U.S.*, 157 F.Supp. 305 (S.D. Calif. 1957).

Respondents below, principally the Commission, have apparently pursuaded the Court of Appeals that this line of cases applies with equal force to efforts by the railroads to obtain review of Commission general increase orders which impose upon the railroads selective holddowns or exceptions to the general increase. Analysis of those cases demonstrates that they provide no basis for dismissal of the petitioners' petition for review in this case.

The Court of Appeals has recently reviewed the present law with respect to the reviewability of general increase orders. *Asphalt Roofing Mfg. Assoc.* v. *I.C.C.*, 567 F.2d 994 (D.C. Cir. 1977). That review may be paraphrased as follows:

> A decision by the Commission whether to suspend a proposed general rate increase is committed solely to the agency's discretion and is unreviewable by the courts.
>
> A decision, after suspension and investigation, permitting a general rate increase to become effective is not reviewable by the courts with respect to the effect of the rate increase upon a particular commodity, since the parties affected by such a rate increase have an administrative remedy (i.e., a complaint under 49 U.S.C. §§ 13 and 15) which they must exhaust.
>
> A decision, after suspension and investigation, permitting a general rate increase to go into effect may be reviewed by the courts with respect to those matters which are "final" in the sense that they need not be further considered by the Commission in another proceeding. In *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 314-319, the Supreme Court held that a determination of the environmental effect of a general rate increase was a reviewable issue. It expressly refrained from deciding whether a determination of the general revenue need upon which the general rate increase was based was re-

viewable, although lower courts have ruled that such a determination is not. In *Council of Forest Indus. of British Col.* v. *ICC*, —— U.S. App. D.C. ——, 570 F.2d 1056 (1978), Judge Wright characterized the law on this issue as "still uncertain" (*id.* at 1061).

A similar analysis of the reviewability of certain types of orders in general revenue proceedings was set forth in the *Council of Forest Industries* opinion (570 F.2d at 1060-1062).

Since those opinions were handed down, the Supreme Court has held that an order of the ICC *suspending* a rate may be reviewed at least to the extent necessary to insure that the order does not "overstep the bounds of Commission authority". *Trans Alaska Pipeline Rate Cases*, U.S. Sup. Ct., No. 77-452 (Slip Op., June 6, 1978, pp. 6-7 n. 17).

None of these prior decisions clearly governs the question of reviewability of the present order. As the Court stated in the *Council of Forest Industries* case (570 F.2d at 1062):

> "Review of ICC orders approving a general increase is *not* available when the petitioners are actually seeking review of the reasonableness *of particular* rates because these issues are not appropriate for consideration in general proceedings, are not addressed by the ICC, and remain open for determination in individual proceedings under Sections 13(1) and 15(1)."

Here the Commission, after refusing to suspend, did address issues with respect to particular commodities. The only difference between the proceedings held with respect to the six commodity groups and the recyclable commodities investigated by the Commission and proceedings instituted by shippers pursuant to Sections 13(1) and 15(1) is that these proceedings were instituted by the Commission (although only where there were protests on file). Orders similar to that at issue here, if issued in a proceeding instituted by a complaint under Sections 13(1) and 15(1) would clearly be reviewable. The instant order, insofar as it deals with holddowns, is "final" in the sense that there is no other administrative proceeding in which the railroads could present these issues.

Similarly, the Commission's decision with respect to the limitations allegedly imposed on the use of general rate increases to meet general revenue needs is "final" in the sense that it establishes an on-going policy with which the carriers must deal in making rate decisions in the future. Since it is based solely on statutory interpretation, that portion of the order is clearly appropriate for judicial review. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

In short, the Commission's order at issue here is not like the orders relating to general rate increases based on general revenue needs. A determination that this order is reviewable will not conflict with the current rulings with respect to the reviewability or non-reviewability of other types of orders (nor will it resolve the "uncertainty" concerning the reviewability of general issues such as findings related to general revenue needs). The limited rule which the carriers seek is that when, in the course of a general revenue proceeding, the Commission issues orders which have the effect of a general rulemaking proceeding, or where, in the course of such a proceeding, the Commission conducts an investigation with respect to rates for specific commodities and makes a determination with respect to the lawfulness of such rates, its orders shall be reviewable to that extent.

II.

THE COMMISSION HAS MISCONSTRUED THE RATE PROVISIONS OF THE 4-R ACT AS NECESSITATING A DE-EMPHASIS OF THE ROLE OF THE GENERAL INCREASE

In its Order, the Commission found that:

> "The tenor, purpose, and policies of the 4-R Act ratemaking provisions necessitate a de-emphasis of the role of the general increase in railroad ratemaking. Our policy is to encourage greater use of the 4-R Act ratemaking provisions and a lessening use of the general increase" (p. 16a, *infra*).

The Commission did state that its "decision does not foreclose general rate increases" (p. 30a, *infra*). However, the Commission's decision is so at odds with the language and purposes of the 4-R Act and poses such a threat to the financial viability of the nation's railroads in terms of their ability to respond to inflationary pressures that it must be subjected to judicial scrutiny.

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act, amending Part I of the Interstate Commerce Act in several important respects. A number of new rate provisions were added to the Act, each of which was intended to give the railroads greater flexibility, to reduce regulatory restraints, and to permit them to obtain "revenue levels adequate . . . to cover total operating expenses . . . plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business" (49 U.S.C. § 15a(4)). Specifically, Section 202(b) of the 4-R Act introduced the concept of "market dominance" by providing that the Commission could not find any rate to be unreasonably high unless it first found that the railroads possessed market dominance (defined as "the absence of effective competition from other carriers or modes of transportation") in respect of the

transportation service to which that rate applied (49 U.S.C. § 1(5)(b)).[4] The market dominance concept is also tied to the new seven percent or so-called "yo-yo" provision which provides that the Commission may not suspend a rate increase (or decrease) of seven percent or less unless it finds that the railroads possess market dominance (49 U.S.C. § 15(8)(c)). In addition, the 4-R Act added provisions providing for the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand (49 U.S.C. § 15(17)), for the establishment of separate rates for distinct services (49 U.S.C. § 15(18)), and for capital incentive rates designed to "increase the attractiveness of investing in railroads and rail-service-related enterprises" (49 U.S.C. § 15(19)).

Each of these four pricing reforms was addressed to a particular problem arising from Congress' perception of restraints which regulatory policies had placed on individual rate initiative. In each instance Congress determined that regulatory restraints were undue, and it intended to reduce the scope of regulation and/or encourage carrier ratemaking initiative.

The Commission, however, has construed the rate provisions of the 4-R Act as requiring what it characterizes as a "de-emphasis" of the role of the general rate increase; and it is that construction which prompted the Commission to select, based upon revenue/variable cost ratios, seven commodity groups for investigation and eventual rollback.

The Commission's construction is clearly erroneous. There is nothing in the 4-R Act or in its legislative his-

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[4] In a rulemaking proceeding mandated by the 4-R Act the Commission established standards for determining whether and when a railroad possesses market dominance. A rebuttable presumption of market dominance is established where the rate in issue exceeds the variable cost of providing the service by 60 percent or more (49 C.F.R. 1109.1).

tory which remotely suggests that the Congress intended to eliminate or de-emphasize the general rate increase. To the contrary, the 4-R Act explicitly recognizes and provides for continuation of the general increase as a means of promoting the financial viability of the railroads.

The nation's railroad rate structure is a complex pricing system which has developed over many years in response to market forces. Millions of individual rates have come into existence to meet varying markets, and the process is ongoing as new rate publications are made in relation to shipper demands, competition, and other economic and regulatory conditions. Individual rates and rate adjustments are therefore an appropriate response to particular situations. However, when economic conditions pervade every market and affect the entire railroad industry, the only appropriate response is a general rate adjustment with only such exceptions as are determined by the carriers themselves to be required by competition. Increased costs of doing business and inadequate earnings have affected the nation's railroads for many years and have made general rate increases an essential element of survival.

In the first general increase proceeding, over 50 years ago, the Commission recognized the practical necessity of across-the-board percentage increases to improve earnings and to help offset wage increases, stating that raising rates on an individual commodity basis "is precluded by the necessity of prompt action." *In the Matter of the Application of Carriers in Official, Southern and Western Classification Territorities for Authority to Increase Rates*, 58 I.C.C. 220 (1920). In that proceeding, the Commission also stated that:

> "Our attention was called at the hearing to a number of formal complaints now pending, and we are asked to except from the general increase the rates at issue in those complaints. This would have the

> effect, during the pendency of these proceedings, of giving the rates in question a preferred status and of exempting them from the general increase. In our opinion, a fairer disposition will be obtained by applying the general increase to these rates with the understanding that this action is without prejudice to any future findings" (58 I.C.C. at 248).

In recent years the Commission has repeatedly reaffirmed the propriety of general, across-the-board percentage rate increases. In approving the general increase proposed in Ex Parte No. 262 to offset cost escalation, the entire Commission held:

> "In this economic climate a horizontal increase applied to all rates is the fairest means of distributing the burden of providing additional needed revenues." *Increased Freight Rates—1969*, 337 I.C.C. 436, 479 (1970).

Two years later, the Commission reaffirmed its confidence in the railroads' ratemaking judgment in responding to inflation through a general rate increase in Ex Parte No. 281:

> "Where, as here, respondents have shown a substantial and compelling need for immediate revenue relief, their judgment in apportioning the burden of meeting that need among varying segments of traffic should be accorded due weight since, presumptively, it reflects an intimate awareness of the degree to which certain traffic is capable of bearing increaesd rates, and every imposed adjustment will result in a loss of needed revenue." *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290, 332 (1972).

The Commission undertook a comprehensive review of the consequences of successive general rate increases in its Ex Parte No. 270 investigation. Commissioner Hardin, acting as Coordinator, indicated that general increases were proper and accepted responses to rising costs:

> "General rate increases have not been self-defeating in recent years, based on the evidence thus far reviewed in this investigation. Rather they appear to be a necessary means for the carriers to recoup some of the general cost increases in time of severe inflation. As inflation may be said to becoming a way of life, general rate increases may in turn become increasingly 'institutionalized' as appropriate responses to rising costs." *Investigation of Railroad Freight Rate Structure*, 345 I.C.C. 2042, 2046 (1976).

The Coordinator went on to find that successive general rate increases have not produced substantial problems in the overall rate structure:

> "This investigation has been oriented primarily to the concerns expressed in terms of the effects of general rate increases on the rate structures. The commodity studies have so far revealed that, in fact, problems do exist as a result of the general increase but they are for the most part not of the gravity feared initially. The Coordinator is also satisfied that railroad ratemaking, as practiced in the marketplace over the years under Commission supervision has evolved rate structures, however intricate and complex that are generally responsive to public and private needs." *Id.* at 2055.

This Court has sustained the propriety of general rate increases and has specifically recognized that the railroads' revenue needs take precedence over consideration of individual commodity rates. In *New England Divisions Case*, 261 U.S. 184 (1923), the Court gave approval to a long line of general rate increases and found that the increased rates were lawful based on "evidence deemed typical of the whole rate structure." *Id.* at 197-98.

In *United States* v. *Louisiana*, 290 U.S. 70 (1933), the Court interpreted the then-applicable Rule of Ratemaking. It held:

> "As pointed out in the reports of the Commission in this case and others . . . § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case*, *supra*, 197 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule." *Id.* at 75-76.

The Court went on to hold that:

> "[I]n performing the duty broadly to increase carrier revenue, it is enough if the Commission, *in the first instance*, makes such inquiry and investigation as would enable it to say that the prescribed increases then applied to members of the group will *generally* not exceed a reasonable maximum." *Id.* at 76-77. (emphasis supplied).

In recent years, as economic inflation has continuously raised the cost of providing all rail services, the Court has specifically recognized the propriety of using "across-the-board" *rate* increases to offset "across-the-board" *cost* increases:

> "Where the increase initiated by a railroad related only to a single commodity, and where the ICC conducts an investigation, the investigation will be a thorough inquiry into the justness and reasonableness of that particular rate. However, the reason for increasing a particular rate may be a reason, such as across-the-board cost increases, which dictates an increase in virtually all rates by a large number of railroads. In those cases, the railroads have, in the exercise of their initiative, proposed across-the-board increases applicable to all or nearly all of their rates." *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289, 311 (1975).

There is nothing in the 4-R Act which in any way suggests that the Congress intended to do away with or even to minimize the use of the general increase as a means of generating adequate revenue levels. In fact, prior to the 4-R Act, the Interstate Commerce Act contained no reference to general rate increases; the general increase evolved as a matter of Commission policy and judicial sanction. In the 4-R Act, Congress for the first time expressly recognized the general rate increase. In Section 208, dealing with rate bureaus, Congress provided that the new limitations upon rate bureau activities "shall not be applicable to . . . general rate increases" (49 U.S.C. § 5c(5)(b)). And, in Section 202, Congress provided that certain new limitations upon the Commission's power to suspend rate changes shall "apply only to rate changes which are not of general applicability to all or substantially all classes of traffic" (49 U.S.C. § 15(8)(c)).

More importantly, the entire framework of the 4-R Act and its legislative history reveals that the new rate provisions were not intended as a substitute for or as an offset to the general increase, but rather were intended to enable the railroads to respond with fewer regulatory inhibitions to particular situations. The Congressional purpose underlying the special rate provisions makes it abundantly clear that each such provision was intended both to provide the railroads with greater ratemaking flexibility and to reduce regulatory interference. There is no basis whatever for any inference that by enacting these provisions Congress intended to discourage general rate increases.[6]

[6] This is so not only as a matter of statutory construction, but also as a matter of practical economics. The railroads have estimated that all of the increases pending under the special rate provisions of the 4-R Act would generate about $27 million annually. In sharp contrast, the 5 percent Ex Parte 343 general increase was calculated to yield approximately $930 million as a partial offset to a cost escalation on the order of $1.1 billion.

The railroads submit that the Commission clearly misinterpreted the impact of the 4-R Act amendments. The railroads may or may not be correct on this contention; but what is beyond dispute is that the contention should have been entertained by the Court of Appeals.

III.

THE COMMISSION HAS NOT ADEQUATELY EXPLAINED ITS ANNOUNCED DEPARTURE FROM THE LONG-STANDING PRACTICE OF AUTHORIZING GENERAL RATE INCREASES

As discussed in the preceding section, the Commission has for a period of over 50 years recognized, and has authorized, general rate increases as the only practicable means of enabling the railroads to even attempt to keep pace with cost escalations. The Commission's Ex Parte 343 decision and order which announces an intention to minimize, and even perhaps eliminate, the general rate increase is totally at odds with the language and spirit of the 4-R Act. But even if the 4-R Act were construed as permitting a de-emphasis of the role of the general increase, the Commission has in the Ex Parte 343 failed to explain adequately its departure from the prior practice of authorizing general rate increase as a response to pervasive cost increases.

The only justification offered for the Commission's change in its procedures and standards is its erroneous interpretation of the 4-R Act:

> "This decision does not foreclose general rate increases. It does establish a Commission policy which will deemphasize the general increase. These powers include an ability to impose holddowns where necessary in a general increase proceeding. * * *"

The statement, even if it were based on a correct interpretation of the effect of the 4-R Act would not meet the

test which the Supreme Court has imposed where the Commission desires to depart from prior norms.

In 1953, this Court in *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1953), vacated a decision of the Interstate Commerce Commission holding that "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." Relying on *Secretary of Agriculture, supra*, the Supreme Court in *Atchison T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1972) affirmed a District Court decision, which had remanded a decision to the Interstate Commerce Commission because the Commission had not adequately justified its departure from a longstanding Commission rule regarding separate charges for inspection of grain in transit. In so doing, the Supreme Court stated that "[W]hatever the ground for departure from prior norms, however, it must be clearly set forth so the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* at 808.

More recently, in *National Ass'n of Food Chains, Inc.* v. *I.C.C.*, 175 U.S. App. D.C. 346, 535 F.2d 1308 (1976), the court vacated and remanded to the Commission a decision in a rulemaking proceeding which limited, on reconsideration, the statutory obligation of meat haulers to offer unloading services. In that proceeding, the Commission, in its initial decision of October 18, 1974, held that carrier unloading was required not only by trade practice, but also by commercial necessity. On reconsideration, however, the Commission (on March 14, 1975) reversed itself on the issue of a carrier's obligation to provide unloading service, in part on the ground that it now concluded that carrier unloading is neither a matter of trade practice nor commercial necessity. Prior to its decision on reconsideration, "the Commission consistently had rejected the contention that an absence of commercial

need for carrier unloading could be established by trade practice . . ." *Id.* at 1316. On review, the court stated that "[I]t must be concluded that the Commission did not demonstrate that its conclusion as to commercial need for unloading services was supportable on the record before it." *Id.* at 1318. In holding that no rational basis or conceivable explanation existed in the record to support this shift in position by the Commission in this same proceeding, the Court cited *Greater Boston Television Corp.* v. *FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971) wherein this Court stated:

> "Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. *But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored*, and if an agency glosses over or serves *from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.*' 143 U.S. App. D.C. at 394, 444 F.2d at 852. *See also, National Welfare Rights Organization* v. *Mathews*, 174 U.S. App. D.C. 410, at ——, 533 F.2d 637, at 648 (1976); *Amoco Oil Co.* v. *EPA*, 163 U.S. App. D.C. 162, 501 F.2d 722 (1974)." *National Ass'n of Food Chains, Inc., supra*, at 1314 (Emphasis added.)

The situation in this proceeding, wherein the Commission changed its course without any reasoned analysis in contravention of prior decisions, is not unlike the situation in *National Ass'n of Food Chains, Inc., supra.* There, as here, the Commission provided no rational basis or explanation either in the record or in its Decision and Order for the precipitous departure from prior Commission prac-

tice, and the Commission has crossed "the line from the tolerably terse to the intolerably mute" and abused its discretion.

The effect of the Commission's action in imposing holddowns on the basis chosen here is to make it impossible for the carriers to achieve anything near the revenue anticipated from the general rate increase which the Commission found would only partially offset their demonstrated revenue needs. In any general revenue proceeding, the parties recognize that allowing a percentage increase in any amount does not mean that the carriers' revenue will increase by that amount. Voluntary flagouts and competitive factors will preclude realization of the full benefits of the permission to increase rates. What the Commission has done here is to identify groups of commodities which, as shown by relatively high revenue/cost ratios, are best able to serve as a source of additional rail revenues, and to diminish their proportionate contribution to meeting the carriers' revenue needs. Since the Commission has not authorized increased rate increases for other commodities (and, indeed, could not in this proceeding), and since, by definition, these other commodities are less able to bear increases and more subject to competition, the Commission fails to indicate just how the railroads are to meet their revenue needs. Surely, it cannot contend that the special rate provisions of the 4-R Act—which are intended to meet particular circumstances or permit competitive rate reductions—offer the prompt relief required.

IV.

IN SELECTING CERTAIN COMMODITIES FOR INVESTIGATION THE COMMISSION ACTED ARBITRARILY

As indicated previously, the Commission, as a consequence of its erroneous interpretation of the rate provisions of the 4-R Act, selected for investigation the rate increase as it applied to seven commodity groups. Quite apart from the fact that the selection of individual commodities for holddowns, or for investigation and ultimate roll-back, is contrary both to longstanding practice and to the 4-R Act, the selection of particular commodities in this instance was arbitrary and without rational basis.

The Commission selected the seven commodity groups for investigation based upon its analysis of its own 1975 waybill sample "which indicates in each case over half of the revenue earned by the commodity is associated with movements which returned revenue in excess of 180 percent of variable cost." The significance of rates which generate revenues exceeding 180 percent of variable costs is nowhere explained. More importantly, the Commission did not select for investigation the rate on all commodities generating revenues which exceed variable costs by 180 percent or more—it excluded all commodity categories as to which no protest had been filed.

In addition, the data upon which the Commission relied for its selection of commodities were outdated. As indicated, the selection was based upon the Commission's 1975 waybill sample. However, as the railroads pointed out to the Commission, the rates with respect to many of the commodity groups had changed markedly in the period subsequent to 1975.

Plainly, the Commission's selection of commodities rates for investigation was arbitrary and without rational basis.

V.

IN THE PROCEDURE ADOPTED FOR ITS INVESTIGATION, THE COMMISSION DENIED THE RAILROADS THE DUE PROCESS OF LAW TO WHICH THEY WERE ENTITLED

Challenges to the lawfulness of particular rates have always proceeded by complaint under Section 13(1) of the Act and hearing thereon in accordance with Section 15(1). In such a proceeding, the complaining shipper has the burden of proof. Moreover, in such a proceeding, all parties, including the railroads, are accorded full opportunity and adequate time to prepare their evidence, to submit rebuttal evidence, and to conduct cross-examination (5 U.S.C. § 556(d)). Indeed, complaint proceedings or investigations as to the lawfulness of particular rates have taken many months, or even years, to complete.

In this case, the Commission has in two important respects denied the railroads the procedural safeguards they have always been afforded in the case of challenges to individual commodity rates. First, by selecting individual commodity rates for investigation as a part of a general increase proceeding, rather than leaving such matters to individual complaint proceedings as it has always done, the Commission has improperly shifted the burden of proof from the complaining shipper to the railroads.

Having shifted the burden of proof, the Commission then proceeded to deny the railroads anything approaching a reasonable opportunity to sustain that burden. In an order served November 30, 1977, the Commission directed the railroads to file within 30 days their evidence demonstrating that rates on the seven selected commodity groups were just and reasonable. Shortly thereafter, the railroads requested an extension of time within which to prepare their evidence, stating that

> ". . . there is no way the railroads can gather and submit all of the relevant traffic and other facts pertaining to these six commodity groups. . . . Individual major commodity investigations normally consume many months. . . . Trying to compress the equivalent of the investigation of six commodity groups with 30 STCC numbers into . . . a period of less than two months, will involve a denial of due process."

On December 19, 1977, the Commission grudgingly granted the railroads a ten-day extension of time.

Plainly, however, a period of forty days within which to prepare evidence in six major commodity investigations, in order to sustain a burden of proof which should not have been theirs in the first instance, is inadequate and constitutes a denial of due process.

CONCLUSION

Petitioners have raised serious challenges to the Commission's substantive and procedural actions in the Ex Parte 343 general increase proceeding. The order of the Court of Appeals dismissing the petition for review is clearly erroneous.

Respectfully submitted,

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Attorneys for Petitioners

DATED: October 23, 1978

Appendices

APPENDIX A

Eastern Railroads

Akron & Barberton Belt Railroad Company, The
Akron, Canton & Youngstown Railroad Company, The
Algers, Winslow and Western Railway Company
Aliquippa and Southern Railroad Company
Alton & Southern Railway Company
Arcade and Attica Railroad Corporation
Aroostook Valley Railroad Company

Baltimore and Annapolis Railroad Company, The
Baltimore and Ohio Chicago Terminal Railroad Company, The
Baltimore and Ohio Railroad Company, The
Bangor and Aroostook Railroad Company
Bath and Hammondsport Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad
Bellefonte Central Railroad Company
Belt Railway Company of Chicago, The
Berlin Mills Railway, Inc.
Bessemer and Lake Erie Railroad Company
Black River & Western Corporation
Boston and Maine Corporation (Robert W. Meserve and Benjamin H. Lacy, Trustees)
Boyne City Railroad Company
Brooklyn Eastern District Terminal
Buffalo Creek Railroad
Bush Terminal Railroad Company

Cadillac & Lake City Railway Company
Cadiz Railroad Company
Cambria and Indiana Railroad Company
Canadian Pacific Limited on Behalf of Canadian Pacific Lines in Maine
Canadian Pacific Limited on Behalf of Canadian Pacific Lines in Vermont

Canton Railroad Company
Central Vermont Railway, Inc.
Chesapeake and Ohio Railroad Company, The
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago & Illinois Western Railroad
Chicago and Western Indiana Railroad Company
Chicago Heights Terminal Transfer Railroad Company
Chicago South Shore and South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Claremont & Concord Railway Company, Inc.
Clarendon and Pittsford Railroad Company, The
Conemaugh & Black Lick Railroad Company
Consolidated Rail Corporation
Cooperstown and Charlotte Valley Railway Corp., The
Coudersport and Port Allegany Railroad Company
Curtis Bay Railroad Company
Cuyahoga Valley Railway Company, The

Dansville and Mount Morris Railroad Company, The
Delaware and Hudson Railway Company
Delray Connecting Railroad Company
Detroit and Mackinac Railway Company
Detroit and Toledo Shore Line Railroad Company, The
Detroit Terminal Railroad Company
Detroit, Toledo and Ironton Railroad Company

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East Washington Railway Company
Elgin, Joliet and Eastern Railway Company
Everett Railroad Company, The

Fairport, Painesville and Eastern Railway Company
Ferdinand Railroad Company
Fore River Railroad Corporation
Frankfort & Cincinnati Railroad Company

Genesee and Wyoming Railroad Company
Gettysburg Railroad
Grafton and Upton Railroad Company
Grand Trunk Railway System
(Lines in the United States East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carrier:
Canadian National Railway Company
Grand Trunk Western Railroad Company
Greenwich & Johnsonville Railway Company

Hoboken Shore Railroad
Hoosac Tunnel and Wilmington Railroad Company

Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company

Johnstown and Stony Creek Rail Road Company

Kanawha Central Railway Company, The
Kelley's Creek and Northwestern Railroad Company
Kentucky & Indiana Terminal Railroad Company

Lake Erie and Eastern Railroad
Lake Erie and Ft. Wayne Railroad
Lake Erie, Franklin & Clarion Railroad Company
Lakefront Dock and Railroad Terminal Company, The
Lake Terminal Railroad Company, The
Livonia, Avon & Lakeville Railroad Corporation
Long Island Rail Road
Lorain & West Virginia Railway Company, The
Louisville, New Albany & Corydon Railroad Company
Lowville and Beaver River Railroad Company, The
Ludington & Northern Railway

Maine Central Railroad Company
Manufacturers' Junction Railway Company
Manufacturers' Railway Company
Maryland & Delaware Railroad Company

Maryland and Pennsylvania Railroad Company
Massena Terminal Railroad Company, The
McKeesport Connecting Railroad Company
Middle Fork Railroad Company
Middletown and New Jersey Railway Company, Inc.
Midway Railroad Company
Monongahela Connecting Railroad Company, The
Monongahela Railway Company, The
Montour Railroad Company
Montpelier & Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moshassuck Valley Railroad Company
Muncie and Western Railroad Company

Narragansett Pier Railroad Company, Inc., The
Napierville Junction Railway Company
Newburgh and South Shore Railway Company, The
New Hope & Ivyland Railroad Company
New Jersey, Indiana & Illinois Railroad Company
New York Connecting Rail Road Company, The
New York Dock Railway
New York, Susquehanna and Western Railroad Company
Norfolk & Portsmouth Belt Line Railroad
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Northampton and Bath Railroad Company
Norwood & St. Lawrence Railroad Company

Ogdensburg Bridge and Port Authority

Patapsco & Back Rivers Railroad Company
Peoria and Pekin Union Railway Company
Philadelphia, Bethlehem and
New England Railroad Company
Pioneer and Fayette Railroad Company, The
Pittsburgh & Shawmut Railroad Company, The
Pittsburgh, Allegheny & McKees Rocks Railroad Company
Pittsburgh and Lake Erie Railroad Company, The

Pittsburgh and Ohio Valley Railway Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Port Huron and Detroit Railroad Company
Port Jersey Railroad Company
Portland Terminal Company
Providence and Worcester Railroad Co.

Quebec Central Railway Company

Rahway Valley Railway Company
(Rahway Valley Company, Lessee)
Paritan River Rail Road Company
Richmond, Fredericksburg and
Potomac Railroad Company
River Terminal Railway, The
Rosslyn Connecting Railroad Company

St. Johnsbury & Lamoille County Railroad
Skaneateles Short Line Railroad Corporation
South Brooklyn Railway Company
South Buffalo Railway Company
Springfield Terminal Railway Company (Vermont)
Staten Island Railroad Corporation, The
Steelton & Highspire Railroad Company
Stewartstown Railroad Company, The
Strasburg Rail Road Company
Strouds Creek and Muddety Railroad

Terminal Railroad Association of St. Louis
Toledo, Angola & Western Railway Company, The
Toledo, Peoria & Western Railroad Company
Toledo Terminal Railroad Company, The
Toronto, Hamilton and Buffalo Railway Company, The
Tuscola & Saginaw Bay Railway Company
Twin Branch Railroad Company

Union Railroad Company
Unity Railways Company
Upper Merion and Plymouth Railroad Company

Vermont Railway, Inc., The
Virginia Blue Ridge Railway
Virginia Central Railway
Virginia and Maryland Railroad

Warwick Railway Company
Washington Terminal Company, The
Waynesburg and Washington Railroad Company
Wellsville, Addison & Galeton Railroad Corporation
Western Maryland Railway Company
West Virginia Northern Railroad Company
Wilkes-Barre Connecting Railroad
Winfield Railroad Company, The
Winifrede Railroad Company
Wyandotte Southern Railroad Company
Wyandotte Terminal Railroad Company

Youngstown and Northern Railroad Company, The
Youngstown & Southern Railway Company

Southern Railroads

Aberdeen and Rockfish Railroad Company
Alabama Great Southern Railroad Company, The
Alexander Railroad Company
Apalachicola Northern Railroad Company
Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic and East Carolina Railway Company
Atlantic and Western Railway Company

Birmingham Southern Railroad Company
Bonhomie and Hattiesburg Southern Railroad Company

Camp Lejeune Railroad Company
Cape Fear Railways, Inc.
Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company

Carolina Western Railroad
Central of Georgia Railroad Company
Chattahoochee Industrial Railroad
Chattahoochee Valley Railway Company
Cincinnati, New Orleans and Texas Pacific Railway Company, The
Cliffside Railroad Company
Columbia, Newberry and Laurens Railroad Company
Columbus and Greenville Railway Company
Corinth and Counce Railroad Company, The

East Tennessee and Western North Carolina Railroad Company

Fernwood, Columbia & Gulf Railroad Company
Florida East Coast Railway Company
Fort Myers Southern Railroad Company

Gainesville Midland Railroad Company
Georgia Northern Railway Company, The
Georgia Rail Road & Banking Company, Operated as the Georgia Railroad by Lessees: Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company
Georgia Southern and Florida Railway Company
Graham County Railroad Company
Greenville and Northern Railway Company
Gulf Transport Company

Hampton & Branchville Railroad Company
High Point, Thomasville & Denton Railroad Company

Illinois Central Gulf Railroad Company
Interstate Railroad Company

Kentucky and Tennessee Railway

Lancaster and Chester Railway Company
Laurinburg and Southern Railroad Company, Inc.
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company

Louisville and Nashville Railroad Company
Louisville and Wadley Railway Company

Meridian & Bigbee Railroad Company
Mississippi & Skuna Valley Railroad Company
Mississippi Export Railroad Company
Mississippian Railway
Mobile & Gulf Railroad Company (The)

New Orleans & Lower Coast Railroad Company
New Orleans Terminal Company
New River Railway Company
Norfolk Southern Railway Company

Pearl River Valley Railroad Company
Pickens Railroad Company (The)
Port Bienville Railroad (The)
Port Terminal Railroad of South Carolina
Port Utilities Commission of South Carolina

St. Louis-San Francisco Railway Company
St. Mary's Railroad Company
Sandersonville Railroad Company
Savannah State Docks Railroad Company
Seaboard Coast Line Railroad Company
Southern Railway Company
State University Railroad Company
Sumter & Choctaw Railway Company

Tampa Southern Railroad Company
Tavares and Gulf Railway Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railroad Company
Terminal Railway Alabama State Docks

Valdosta Southern Railroad Company

Ware Shoals Railroad Company
Warrenton Rail Road Company

Western Railway of Alabama, The
Winston-Salem Southbound Railway Company

Yancey Railroad Company

Western Railroads

Abilene & Southern Railway Company
Angelina & Neches River Railroad Company
Apache Railway Company, The
Arcata and Mad River Rail Road Company, The
Arkansas & Louisiana Missouri Railway Company
Arkansas Western Railway Company, The
Atchison, Topeka and Santa Fe Railway Company, The

Belton Railroad Company
Bevier & Southern Railroad Company
British Columbia Hydro & Power Authority
British Columbia Railway Company
Burlington Northern Inc.
Butte, Anaconda & Pacific Railway Company

California Western Railroad
Camas Prairie Railroad Company
Camino, Placerville & Lake Tahoe Railroad Company
Canadian National Railways
Canadian Pacific Limited
Carbon County Railway Company
Cedar Rapids and Iowa City Railway Company
Central California Traction Company
Chicago and North Western Transportation Company
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
(William M. Gibbons, Trustee)
Chicago Short Line Railway Company
City of Prineville Railway
Colorado and Southern Railway Company, The
Colorado & Wyoming Railway Company, The

Columbia & Cowlitz Railway Company
Condon, Kinzua & Southern Railroad Company

Dardanelle & Russellville Railroad Company
Delta Valley and Southern Railway Company
Denver and Rio Grande Western Railroad Company, The
DeQueen and Eastern Railroad Company
Des Moines and Central Iowa Railway Company
Doniphan, Kensett & Searcy Railway
Duluth & Northeastern Railroad Company
Duluth, Missabe and Iron Range Railway Company

East Camden & Highland Railroad Company
Elgin, Joliet and Eastern Railway Company
Escanaba and Lake Superior Railroad Company

Fort Smith and Van Buren Railway Company
Fort Worth and Denver Railway Company

Georgetown Railroad Company, Inc.
Graysonia, Nashville & Ashdown Railroad Company
Great Southwest Railroad, Inc.
Great Western Railway Company, The
Green Bay and Western Railroad Company

Holton Inter-Urban Railway Company
Hutchinson and Northern Railway Company, The

Illinois Terminal Railroad Company
Iowa Terminal Railroad Company

Klamath Northern Railway Company
Kansas City Public Service Freight Operation
Kansas City Southern Railway Company, The

Lake Superior & Ishpeming Railroad Company
Laona & Northern Railway Company
LaSalle and Bureau County Railroad Company, The
Longview, Portland & Northern Railway Company
Louisiana & Arkansas Railway Company
Louisiana and North West Railroad Company, The

Louisiana & Pine Bluff Railway Company, The
Louisiana Midland Railway Company

Marinette, Tomahawk & Western Railroad Company
McCloud River Railroad Company
Minneapolis Industrial Railway Company
Minneapolis, Northfield and Southern Railway
Minnesota, Dakota & Western Railway Company
Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Modesto and Empire Traction Company
Moscow, Camden & San Augustine Railroad

Nevada Northern Railway Company
New Orleans & Lower Coast Railroad Company
North Louisiana & Gulf Railroad Company
Northwestern Oklahama Railroad Company
Northwestern Pacific Railroad Company

Omaha, Lincoln and Beatrice Railway Company
Oregon & Northwestern Railroad Company
Oregon, California & Eastern Railway Company
Oregon Electric Railway Company
Oregon Pacific & Eastern Railway
Oregon Trunk Railway

Pecos Valley Southern Railway Company, The
Petaluma and Santa Rosa Railroad Company
Portland Traction Company
(Portland Railroad and Terminal Division)
Port of Tillamook Bay Railroad
Prescott and Northwestern Railroad Company, The

Roscoe, Snyder and Pacific Railway Company

Sabine River & Northern Railroad Company
Sacramento Northern Railway
St. Louis Southwestern Railway Company
Salt Lake, Garfield and Western Railway Company
San Diego & Arizona Eastern Railway Company
Sand Springs Railway Company

San Francisco State Belt Railroad
San Luis Central Railroad Company, The
Santa Maria Valley Railroad Company
Sierra Railroad Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern San Luis Valley Railroad Company
Spokane International Railroad Company
Stockton Terminal and Eastern Railroad
Sunset Railway

Tacoma Municipal Belt Line Railway
Texas & Northern Railway Company
Texas Central Railroad Company
Texas, Oklahoma & Eastern Railroad Company
Texas Mexican Railway Company, The
Texas-New Mexico Railway Company
Texas South-Eastern Railroad Company
Tidewater Southern Railway Company
Toledo, Peoria & Western Railroad Company
Tooele Valley Railway Company
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Tulsa-Sapulpa Union Railway Company

Union Pacific Railroad Company
Utah Railway Company

Ventura County Railway Company
Visalia Electric Railroad Company

Walla Walla Valley Railway Company
Warren & Saline River Railroad Company
Washington, Idaho & Montana Railway
Waterloo Railroad Company
Weatherford, Mineral Wells and
Northwestern Railway Company, The
Western Pacific Railroad Company, The
Western Railroad Company

Yakima Valley Transportation Company
Yreka Western Railroad Company

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 78-1636

[Filed Jul. 25, 1978]

ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

BEFORE: Wright, Chief Judge; Robb, Circuit Judge

ORDER

On consideration of petitioners' motion for stay, the response thereto and of respondents' motion to dismiss, it is

ORDERED by the Court that respondents' aforesaid motion is granted and the petition for review herein is dismissed, and it is

FURTHER ORDERED by the Court that petitioners' motion for stay is dismissed as moot.

Per Curiam

APPENDIX C

Service Date—Jun. 29, 1978

INTERSTATE COMMERCE COMMISSION DECISION

EX PARTE No. 343

NATIONWIDE INCREASED FREIGHT RATES AND CHARGES, 1977

Decided June 28, 1977

SUMMARY

1. The special ratemaking provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, found to necessiate a de-emphasis of the role of the general increase in railroad ratemaking.

2. Respondents granted authority to establish the following increases:

a. 3-percent on newsprint paper; sulphuric acid; rubber, natural or synthetic; and manufactured iron or steel.

b. 2-percent on sodium alkalies and industrial gases based on shipper evidence.

c. 3-percent on recyclable commodities.

BY THE COMMISSION:

INTRODUCTION

This investigation was instituted as a result of our consideration of a proposed nationwide 5-percent increase

in rail freight rates and charges, which went into effect November 30, 1977. In an order served November 10, 1977, we declined to suspend [1] the proposed increase and specified two areas of inquiry.

. an investigation of the interrelationship of the special ratemaking provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)[2] and railroad general increase proceedings (Part I of this decision); and

. an investigation into the lawfulness of the rates, charges and regulations on certain commodities (Part II of this decision).

PART I—INVESTIGATION OF THE INTERRELATIONSHIP BETWEEN THE SPECIAL RATE PROVISIONS OF THE 4R ACT AND RAILROAD GENERAL INCREASE PROCEEDINGS

(A) *Purpose of the Investigation*

The 4R Act contains specific ratemaking reforms aimed at revitalizing the rail industry. While the general rate increase was not included in these reform measures, it is still relied upon by the railroads as their primary means of generating revenue. We believe that reassessment of the role of the general increase in light of the 4R Act ratemaking provisions is essential, in order to formulate

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[1] Non-suspension was conditioned upon the carriers filing a supplement to the master tariff limiting the increase on feed grains from Midwestern origins to New England points to 3 percent and exempting entirely wood chip rates in Items 165 and 180-series, MP Tariff 86-G, ICC 629, on interstate traffic. Such a supplement was filed on November 15, 1977.

All petitions for reconsideration of our order of November 10 have been reviewed. We find that they do not warrant modification of the order and are hereby denied.

[2] 45 U.S.C. 801 (1976).

a consistent regulatory policy which will conform to the objectives and emphasis of the statute.

(B) *Finding*

The tenor, purpose, and policies of the 4R Act ratemaking provisions necessitate a de-emphasis of the role of the general increase in railroad ratemaking. Our policy is to encourage greater use of the 4R Act ratemaking provisions and a lessening use of the general increase.

(C) *Past Commission Policy*

The question of the relationship between general and selective rate increases, has concerned the Commission in a number of recent general increase proceedings. In *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 687 (1957) we stated that "the time [has] probably come when consideration should be given to ways of increasing rates other than by means of horizontal increases." In Increased Freight Rates, 1968, 332 I.C.C. 714, 715 (1969), we responded to a general increase proposal which was not uniform in application by stating that competitive conditions may require a more selective approach than a uniform general increase which applies to all traffic.

In *Investigation of Railroad Freight Rate Structure*, 340 I.C.C. 868 (1971), we instituted a major proceeding in order to investigate, among other issues, whether general increases were potentially self-defeating in their attempt to increase revenues and whether they created or increased distortions in the basic rate structure.

Again, in *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290, 329-30 (1972) we noted:

> Selectivity, however, is not a newborn phenomenon. Historically, so-called "across-the-board" single-level general increase proposals have had a selective aspect since, invariably, they contained provisions ex-

> cepting certain commodities or services from application of the increase either in whole or in part,
>
> . . . .
>
> [W]e are acutely aware, as respondents must be, that the continued and increasing erosion of the traffic base available for meeting [revenue] needs constitutes a clear warning that the time fast approaches (and, indeed, may have arrived) when they can no longer expect any significant revenue relief via the avenue of a general increase. Greater reliance must be placed on other means, including self-help by attracting additional revenue through redoubled efforts to improve service, by reducing expenses through prudent cost-cutting and further increases in productivity, *by seeking specific rate adjustments addressed to circumstances surrounding particular movements of traffic. . . .*" (emphasis added).

There has been only one previous rail general increase considered after the February 5, 1976, passage of the 4R Act. In the order, served December 22, 1976, in Ex Parte No. 336, *Increased Freight Rates and Charges, 1976*, we stated that, while the 4R Act did not preclude the filing of general rate increases, it was clearly designed to encourage the railroads to seek additional revenue through individual rate adjustments. We therefore require the railroads in any future general increase filing to submit detailed explanations of the steps taken to implement the 4R Act rate provisions.

These cases indicate our growing concern that general rate increases may inhibit the railroads from implementing a more efficient pricing policy. At page 124 of our October 5, 1977, report to Congress on *The Impact of the 4R Act Railroad Ratemaking Provisions* (the Section 202 Study), we concluded that general rate increases tend to discourage experimental rate-making. We observed that general rate increases were preferred over selective in-

creases for several reasons, including ease of acceptance by shippers who feel they are being singled out if their rates are selectively increased and perceived minimization of rail resources and expenses needed to obtain the added revenues. Thus, it is clear that there are wide differences of opinion as to what pricing policy would best meet the current and future needs of the rail industry.

(D) *Purposes and Policies of the 4R Act: General*

The 4R Act does not preclude general rate increases. In fact, general rate increases are twice alluded to within the statute, once in connection with rail rate bureau reform [4] and the other in the context of the seven percentum (yo-yo) provision.[5] However, while these references [6] indicate that Congress envisioned the continuance of general rate increases at least in the near future, they do not, in themselves, suggest any specific Congressional intent to foster or to limit the use of the general increase as a ratemaking tool. Since the statutory wording is not definitive, we must look to the purposes and policies of the 4R Act to determine the intent of Congress.

The overall purpose of the 4R Act is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatable transportation services with greater efficiency, effectiveness, and economy, through . . . ratemaking and regulatory reform. . . ." [7] The declared policies of the 4R Act include balancing the needs of carriers, shippers, and the public; fostering competition among all carriers in order to promote more adequate and efficient transportation services and the attractiveness of rail investment; permitting greater railroad price flexibility for rail services in competitive markets; promoting a rate structure more sensitive to variations in demand and separate rates for distinct services; and formulating standards and guidelines for determining adequate rail revenue levels.[8]

[4] 49 U.S.C. § 5C(5)(b)(i).

[5] 49 U.S.C. § 15(8)(c).

[6] In addition, Section 209 of the 4R Act provides that general rate increases must be incorporated into the individual tariffs of each rail carrier within 2 years after they become effective.

The changes in section 1 of the Interstate Commerce Act are intended to inaugurate a new era of competitive pricing.[9] It is the railroads' position that the greater flexibility granted by the specific rate provisions of the 4R Act does not in any way restrict the use of general rate increases. They request that the Commission make the following finding in this portion of the investigation:

> The intent of Congress that the railroads be permitted greater ratemaking flexibility and initiative by provisions in Section 202 and 206 of the 4R Act would be frustrated if we were to take any action in general rate increase proceedings which would offset benefits obtained by the carriers through utilization of the special rate provisions.

It is significant that the stated purpose of the 4R Act is to encourage greater efficiency, effectiveness, and economy through ratemaking and regulatory reform. Congress presumably was aware that general rate increases were the primary means of rail revenue generation and tried to foster a rate structure which would

[7] 45 U.S.C. § 801(a).

[8] 45 U.S.C. § 801(b).

[9] S. Con. Rep. No. 94-595, 94th Cong., 2d Sess. 134 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 149.

provide dynamic new possibilities for rail growth and service improvement. Regulatory restraints which ostensibly discouraged innovation by rail management have been removed.[10] However, railroad response to the opportunities for innovation has been disappointing. While their suggested finding would imply that they have made widespread use of the new special rate provisions, we can find no basis for this assertion. On the contrary, with isolated exceptions, the railroads appear to be continuing an unduly large reliance on general increases as the primary generator of rail revenues.

General rate increases fulfill only one declared policy of the 4R Act—the fostering of adequate rail revenue levels. While this is indeed an extremely important goal, the same purpose can be served by the increased use of innovative ratemaking by individual carriers. Recently, in Ex Parte No. 338, *Standards and Procedures For the Establishment of Adequate Railroad Revenue Levels*, —— I.C.C. ——, served February 3, 1978, we indicated that rail revenue need would be considered in individual rate proceedings so as to encourage particular rate adjustments. A selective approach can also foster attainment of other 4R Act policies by encouraging a more competitive rail pricing system. There is clearly a greater need for rail management to pursue such innovative approaches as demand-sensitive pricing and separate rates for distinct rail services, to name but two examples. It was the intent of Congress to encourage a systematic analysis of instances where rail pricing could be made more efficient. This simply cannot be done in the context of an across-the-board increase.

The railroads' suggested finding is a one-dimensional view of the 4R Act. Attainment of the statutory goals

[10] For example, the Commission's Section 202 Study shows that only 5 percent of individual rail rates which were challenged as too high were suspended in a test period from October 1, 1976, through July 31, 1977.

will only be possible by a multi-faceted, imaginative effort. General rate increases should constitute an ever-decreasing part of that effort. The Commission has the duty to see that the attempt is made. For the Commission to encourage the use of general rate increases would constitute a retreat from the goals of the 4R Act, rather than a step towards competitive pricing and greater efficiency.

(E) *Analysis of Particular 4R Act Ratemaking Provisions and Their Relationship to General Rate Increases*

(1) *Encouragement of Rail Adequate Revenue Levels*

The Commission was required by section 205 of the 4R Act [11] to develop standards and procedures for the establishment of adequate revenue levels for the railroads and to assist the carriers in attaining these levels. The railroads interpret this statutory mandate as encouraging both general and selective rate increases.

The Commission developed these standards and procedures in Ex Parte 338, *supra*. We made clear there that the new rail rule of ratemaking cannot be construed as encouraging the use of general rate increases in the promotion of revenue adequacy. We noted that general rate increases might be necessary in some circumstances as a means of aiding the overall revenue level of the railroad industry and that revenue adequacy would be regarded as an important factor in these proceedings. However, we also noted that general increases have many other undesirable features, including the potential for widespread disruption of numerous kinds of competitive relationships and for self-defeating traffic losses if the competitive effects of the increase are not adequately analyzed. Implicit in our discussion was the fact that these problems can be avoided by a selective approach which increases or de-

[11] 49 U.S.C. § 15a(4).

creases individual rates based on a more sophisticated analysis of competitive circumstances.[12]

In an effort to encourage greater use of individual rate adjustments, we held in Ex Parte No. 338 that the revenue adequacy of the affected carrier would be an important factor, although not the sole criterion, in considering the reasonableness of individual rates. We noted that fixed costs cannot be recovered in equal proportions from each service because demand and competitive factors place varying limits on the rates that can be maintained on different types of traffic. This constitutes a recognition that no one rate-to-cost ratio can fully constitute a reasonableness standard for all traffic.

The effect of Ex Parte No. 338 is to broaden the types of proceedings in which rail revenue adequacy is a relevant factor. Together with other statutorily and self-imposed restraints on the Commission's suspension power and jurisdiction, any regulatory restraints against carrier initiative which might have existed are now gone. There is no reason why the railroads cannot make a greater effort to use specific rate adjustments.

(2) *Section 202 Ratemaking Provisions*

(a) *General*

Section 202 of the 4R Act, in addition to encouraging the publication of demand-sensitive rates and separate rates for distinct rail services, provides two new threshold tests for determining the reasonableness of rail rates. No changed rate may be found too low (assuming it does

[12] We also noted that the possible adverse impact on particular commodities will be considered in general rate increases through evaluation of Schedule C data required to be filed by the regulations adopted in Ex Parte 290, *Procedures Governing Rail General Increase Proceedings*, 351 I.C.C. 544 (1976) (as modified by subsequent orders).

not violate other provisions of the Act) if it contributes to the going concern value of the proponent railroad. A rate which equals or exceeds variable costs is presumed to contribute to the carrier's going concern value. No rate may be found unreasonably high unless the Commission has found that the rail carrier has market dominance over the involved service.[13] Section 202(e) also provides an increased burden on shippers to obtain suspension of any rail rate, and a limited "zone of reasonableness."[14]

(b) *Market Dominance*

The concept of market dominance only becomes relevant when a rail rate is challenged as unreasonably high. The 4R Act defines market dominance as "the absence of effective competition from other carriers or modes of competition, for the traffic or movement to which the rate applies." The legislative history reveals that the test was designed only as a threshold criterion to direct the Commission's regulatory activities into areas where the public interest needs protection and to give the railroads pricing flexibility where effective competition from other railroads or modes can supplant the need for maximum price regulation.[15] An additional effect would be to give the railroads, if they so choose, the freedom absent discrimination and prejudice, to raise rates in competitive markets.[16]

[13] 49 U.S.C. § 1(5)(b).

[14] 49 U.S.C. § 15(8)(b) and (c) provided a 7-percent per year zone of reasonableness. This provision expired on February 5, 1978.

[15] S. Rep. No. 94-499, 94th Cong., 1st Sess. 47 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 61.

[16] Obviously, the exercise of this flexibility would be greatly restrained by competitive forces which would tend to keep rail rates down. This casts serious doubt on whether market dominance was actually designed as a rail revenue measure (as opposed to other 4R Act provisions, such as section 15a(4), which clearly are so) or only as a lessening of unnecessary regulation.

Congress never intended that the market dominance test be applied to general rate increases. The very nature of the general increase precludes application of the market dominance test. General increases apply to numerous rates. If market dominance determinations were necessary for each individual rate, this would effectively destroy the purpose of the general increase. In *Increased Freight Rates, 1948*, 272 I.C.C. 695, 704 (1948) we stated:

> While investigations . . . into the lawfulness of proposed general increases in rates and charges, deal primarily with revenue considerations, the reasonableness of resulting rates as generally applied is a factor to which [the Commission gives] as full attention as is permitted by the record and nature of the proceeding. But if the administrative arm of the Commission is not to be wholly paralyzed, the evidence in a proceeding of this nature must in general, be directed to the rate adjustment as a whole, or to the adjustments on particular commodities or commodity groups, and not to the individual rates.

Applying market dominance to the myriad of rates subject to a general increase would cause such a paralysis. Also, the legislative history indicates that Congress intended the Commission to retain authority to suspend a general increase or decrease without the need for a market dominance finding.[17]

In summary, market dominance gives little indication whether Congress intended to foster or inhibit general rate increases, although it does give the railroads greater freedom in individual upward rate adjustments.

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[17] S. Con. Rep. No. 94-595, 94th Cong., 2nd Sess. 147 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 162.

(c) *Going Concern Value*

The going concern value of the proponent railroad must be considered when a proposed rate is attacked as unreasonably low. Section 1(5)(b) provides that a rate cannot be held unreasonably low if it contributes to the carrier's going concern value. Presumably, rates which are at least equal to the variable cost of service contribute to going concern value. The section encourages selective rate increases of unprofitable rates to levels which increase the financial health of the carrier as a whole. A carrier is also free to lower its rates in an effort to meet competition, so long as the reduced rate does not detract from the carrier's going concern value. The concept clearly encourages selective adjustments in an effort to reduce the number of non-compensatory rail rates and increase overall rail revenue.

(d) *Demand-Sensitive Rates*

The 4R Act added a new section 15(17) to the Interstate Commerce Act. This provision required the Commission to adopt standards and expeditious procedures for establishment of rail rates based on seasonal, regional, or peak-period demand. The Commission responded by the regulations adopted in Ex Parte No. 324, *Standards And Procedures For Railroad Rates*, 355 I.C.C. 521 (1977) (as amended by order served July 20, 1977). Those regulations are designed to implement the expressed Congressional purposes of inducing shippers to reduce peak-period shipments through rescheduling and advance planning, generating additional rail revenue, and improving rail car utilization, rail service and employment levels, and the financial stability of markets served by railroads.

In our Section 202 Study, we concluded that demand-sensitive pricing may offer the largest potential benefits of any of the Section 202 provisions. The railroads may

use upward or downward adjustments to increase their revenues and to even out demand. As demand is smoothed, an increasing car supply can be used to increase rail traffic levels on profitable movements. However, railroad use of this provision has been limited thus far.[18] More activity in this area is needed.

The demand-sensitive rate provision clearly indicates a strong Congressional favoring of selective rate adjustments. It encourages experimental ratemaking of a type which cannot be accomplished by a general increase.

(e) *Separate Pricing of Distinct Rail Services*

The revised section 15(18) of the Act encourages filing of separate rates for distinct rail services. The purpose of this provision is to encourage competition, promote increased investment and reinvestment by railroads and others in the production of rail services. Ex Parte No. 331, *Procedures For Publication Of Separate Rates*, 355 I.C.C. 683 (1977), developed procedures to encourage separate rates for distinct rail services.

On the issue of the interrelationship of this special ratemaking provision and general increases, we stated in that decision[19] that these arguments could only be dealt with on a precise factual basis and, therefore, must await resolution on a case-by-case basis. We noted that the Commission cannot completely eliminate the right of carriers to file for general rate increases since Congress has not granted us the authority to do so and since the 4R Act makes specific references to general rate increases.

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[18] In Docket No. 36663, Demand-Sensitive Rates in Grain and Soybeans—Southern Freight Association Territory, a rate adjustment permitted by the Commission to become effective without investigation or suspension was later remanded for investigation by the United States Court of Appeals for the Eighth Circuit because of fourth section violations.

[19] 355 I.C.C. at 715.

As we have noted before in Ex Parte 331, railroads have always been permitted to file separate rates for any service which is not an integral part of the line-haul service itself. Section 15(18) states a Congressional policy in favor of this selective form of railroad pricing in order to encourage rates which at least recover the cash-outlays for the particular service and to enable shippers to better evaluate all available transportation alternatives and charges. In this respect, it is additional evidence that Congress intended a much greater use of selective ratemaking by the railroads.

(f) *Statutory Burden of Proof to Obtain Suspension*

The revised section 15(8)(d) provides, for the first time, what showing must be made by any protestant seeking suspension of any rail rate. The protestant must demonstrate "by specific facts shown by a verified complaint" that failure to suspend would cause substantial injury to it or the party it represents, and that it is likely to prevail on the merits. This burden is applicable in both general and individual rate increase proceedings. However, its impact seems to be most dramatic in the latter instance.

A rail protestant in an individual rate increase must show concrete evidence that the increase will tangibly injure it if not suspended. It must also show specific facts which point to a likelihood of success on all issues necessary to a finding of unlawfulness, including the market dominance issue if the rate is challenged as unreasonably high. Thus, since a market dominance finding is not necessary in a general rate increase proceeding, the burden on protestants has been increased more in individual rate proceedings then in general increase proceedings. This is yet another indication of a Congressional intent in favor of specific rate adjustments.

(g) *The Yo-Yo Provision*

Sections 15(8)(b) and (c) of the Act, which expired on February 5, 1978, provided a limited 7-percent zone of reasonableness. The Commission could only suspend rates published under this provision if they appeared to violate sections 2, 3, or 4 of the Act, or to constitute a destructive competitive practice, or if the Commission made a finding of market dominance prior to suspending. The provision could only be used for specific rate adjustments and not for general increases. The express exclusion of general rate increases from this provision is a strong indication that Congress intended that they play a decreasing role in rail ratemaking.

(3) *Rate Incentives for Capital Investment*

One additional ratemaking reform is contained in section 206 of the 4R Act[20] which permits the filing of proposed capital incentive rates whenever the implementation of a proposed rate schedule would require a total capital investment of $1 million or more. Once approved, a capital incentive rate is protected for a period of 5 years from findings of unlawfulness under sections 1, 2, 3 and 4 of the Act, with certain limited powers of revision vested in the Commission. This statutory immunity granted to capital incentive rates does not expressly enjoin filing carriers from increasing or reducing rates during the 5-year period. Thus, the carriers are free to negotiate whatever conditions they wish within the guidelines set forth in Ex Parte No. 327, *Rate Incentives for Capital Investment*, 353 I.C.C. 754 (1977). We noted in Ex Parte No. 327 that potential investors may determine in advance whether general increases will apply to proposed capital incentive schedules, or whether an escalation formula should apply instead. In *Incentive Rate on Coal—Cordero, Wyoming to Smithers Lake, Texas*, ——

[20] 49 U.S.C. § 15(19).

I.C.C. ——, (served November 30, 1977), we held that an escalation formula could not be imposed on an unwilling shipper in the absence of good-faith negotiations. If general rate increases do apply to a proposed capital incentive item, an affected shipper could protest any such increases since the Commission's determination of lawfulness will only cover the initial rate level.[21] By comparison, if a negotiated escalation clause is found lawful all adjustments under that escalation clause receive the protection of the statute for 5 years after the schedule becomes effective.

The capital incentive rate provision is intended to encourage major investments in rail equipment and facilities, particularly from sources outside the rail industry. It is a concept which by its very nature cannot be applied in a general increase proceeding, since there must be an identifiable nexus between the qualifying investment and the capital incentive rate schedule. Thus, section 15(19) puts a greater emphasis on selective ratemaking. We have taken a positive step toward discouraging general rate increases by our support of negotiated escalation clauses.

(F) *Summary*

In order to give effect to the intent of Congress, the general increase must be de-emphasized in favor of selective adjustments. We are not convinced that a sincere effort is being made to develop a comprehensive selective adjustment program. There is a built-in resistance toward electing this approach, since initially it takes less effort and resources for the railroads to pursue general increases. Superficially, general increases provide an easy answer to the problem of rising costs and inadequate earnings. However, they have many recognized disadvantages, including the burden placed on higher-rated

[21] 353 I.C.C. at 775.

commodities that bear a disproportionate share of such increases. In the long run, straight percentage across-the-board adjustments may actually lead to a decline in revenues as a result of diversion of traffic to competing modes.

The Congress has provided the means for revitalization of the rail industry, but this end cannot be achieved if the means which were specifically legislated are not utilized or are otherwise circumvented by relying on the status quo. The railroads are in effect arguing for any means which will improve the short-term earnings of the industry. We however cannot give blanket approval to this approach since it ignores the railroads' long-term financial outlook. In the long run, the railroad industry will only remain a viable mode of transportation if it responds to competitive conditions in the individual markets it serves and makes use of the opportunities for innovative ratemaking which it has thus far largely ignored.

This decision does not foreclose general rate increases. It does establish a Commission policy which will de-emphasize the general increase. These powers include the ability to impose holddowns and exceptions where necessary in a general increase proceeding. An official policy of non-involvement, as contemplated by the railroads, would be abandoning our commitment to the public interest and, therefore, must be rejected.

PART II—COMMODITIES INVESTIGATION

(A) *Scope of Investigation*

The scope of the commodities under investigation was determined on the basis of the record in this proceeding and Commission analysis of the 1975 waybill sample contained in the Section 202 Study. Some commodities were selected for investigation where over half of the revenue earned by the commodity is associated with movements

which returned revenue in excess of 180 percent of variable cost. The commodities under investigation are:

1. Newsprint Paper
2. Sodium Alkalies
3. Industrial Gases
4. Sulphuric Acid
5. Rubber Natural or Synthetic
6. Manufactured Iron or Steel
7. Recyclables

In the order denying suspension in this proceeding we found that the 5-percent increase was generally justified based on the railroads' need for additional revenues to partially offset their increased costs of operation. This finding does not, however, preclude the Commission from investigating the lawfulness of the increase as it applies to specific commodity groups. The issue to be resolved is whether the 5-percent increase on the commodity groups under investigation is just and reasonable. Pursuant to section 15(8)(a) of the Act, the burden of proof is on the railroad respondents to show that the increases on these commodities are just and reasonable.

(B) *Test of Reasonableness*

The railroads contend that selection of commodities for investigation on the basis of rate/cost ratios is an arbitrary standard and will be utilized by the Commission as the sole criterion for judging the reasonableness of the rates under investigation. Most of their argument and supporting evidence is predicated on this basic premise. Certain parties characterize respondents' contention as a "strawman" argument designed to obscure the real issue before the Commission. Suffice it to say, that use of rate/cost ratios for the purpose of delineating areas in need

of investigation is not indicative of an intent on the part of the Commission to transform this pre-investigatory tool into an arbitrary standard for the determination of reasonableness of rates. It is well settled that the scope of an investigation proceeding is within the discretion of the Commission. The rate/cost ratio is an appropriate tool for use by the Commission in determining what should be investigated. This does not imply any prejudgment of the lawfulness of the investigated rates on our part. To the extent that the railroads have based their argument on this premise, they have avoided the relevant issue.[22]

The test of reasonableness actually involves the consideration of many competing factors. A decision is reached by weighing rail revenue need, cost considerations, and other factors such as rate relationships on the same or similar traffic in affected territories, length of haul, volume or density of traffic, nature of the commodity, value of service, market and modal competition. All of these factors are relevant and are considered in arriving at a decision.

Respondents have attempted to minimize the role of costs, presuming that cost evidence is unnecessary because of established revenue need. Cost evidence is limited to comments in rebuttal to shippers cost data, an analysis of the Section 202 Study data, and a restatement of the rate/cost ratio on newsprint. Economic theories of demand pricing[23] are proffered to elevate the element of

[22] The railroads devoted a considerable portion of their argument to this point, which they term the "arbitrary rate/cost ceiling." In addition to stating the effects of imposing such a ceiling, the railroads developed an elaborate study in which they applied a 180-percent rate/cost ratio ceiling, utilizing 1975 waybill data. They concluded that imposition of such a ceiling in the test year, 1975, would have "wiped out railway earnings" in that year.

[23] The ratio of price to attributable cost for each service is said to be inversely proportional to the elasticity of demand for that service.

value of service over cost of service. Value of service is a factor to be considered in the reasonableness determination. We have long recognized the necessity of apportioning greater increases on higher-valued commodities which are better able to sustain the burden of additional increases. However, there is a limitation on the value of service concept. The upper limits of the zone of reasonableness are not equivalent to what the traffic will bear, but rather what the traffic can *reasonably* be required to bear. It would be unjust to require traffic to pay rates returning an exorbitant profit over cost, merely because it can do so and still continue to move. This would tend to penalize shippers who have no alternative to rail service. Demand pricing is theoretically sound. However, the practical application of this theory in all instances could result in rates which exceed a just and reasonable maximum. The railroads' theory does not address the reasonableness of these particular rates in issue. While cost evidence is not the exclusive test of reasonableness it at least provides a standard by which to measure the extent to which the rate level deviates from the cost of providing the services and so is helpful in keeping this margin within reasonable bounds. Respondents have failed to set forth any relevant cost evidence (with the exception of newsprint, the reliability of which will be discussed below) to aid in evaluating the increases on the commodities in question. The railroads have argued vigorously against use of the rate/cost ratios contained in the Section 202 Study. They question the credibility of the study[24]

[24] The railroads allege that the Commission's Burden Study has not been shown to be reliable because there is no provision for estimating standard error, which is an essential adjustment in probability sampling.

As we noted in No. 37114, Potomac Electric Power Company v. Penn Central Transportation Company, served April 12, 1977, the Burden Study is only intended to show roughly the relative revenue contribution between various commodity types and not to establish the reasonableness of any particular rates. The application of the

and yet they have supplied no competent cost evidence to take its place. In short, respondents have left us with no alternative by which to estimate the costs involved in transporting these commodities. It would appear that they advocate that the Commission make a determination by evaluating the other factors which determine reasonableness, in a vacuum. We do not believe that such an approach constitutes an informed decision. As we stated in *Potomac Electric Power Company* v. *Penn Central Transportation Company*, —— I.C.C. ——, served April 17, 1978, at 22-23, in regard to revenue-cost comparisons:

> With the growing sophistication in costing attained in recent years, revenue-cost comparisons have been given even greater emphasis in measuring the reasonableness of rates. . . .
>
> The use of revenue-cost comparisons in judging the reasonable level of rates is not new, has been relied on even more strongly in recent years, and will be given even greater significance as costing methods continue to be refined.

Our policy is to encourage parties who have the necessary resources and the burden of proof to submit more refined cost presentations to aid in our decision making.

(C) *Respondents' Argument*

The railroads' basic argument is that revenue need is unquestioned and, due to the economies of the rail industry, additional revenue can only be obtained from a small percentage of high-valued traffic. If common costs were prorated among low-valued commodities, the railroads contend that inevitable offsetting traffic losses would only serve to reduce the amount of traffic over which to spread

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rate/cost ratios in this proceeding was limited to defining part of the scope of the investigation.

common costs, to the ultimate detriment of higher-paying shippers. Furthermore, the railroads maintain that there is no alternative from which to make up the needed revenues, nor has any such alternative been suggested by the parties in this proceeding. In addition to eliminating the source of this small margin of profit, the railroads predict collateral effects, such as voluntary downward adjustments on rates for competing traffic to prevent violations of the act, leading to yet further revenue erosion.

Finally, the railroads cite to Ex Parte No. 338, *supra*, as a mandate prohibiting exceptions on those commodities from the 5-percent increase. Since we have discussed in detail the impact of section 205, in Part I, no further comment is necessary on this point.

The remainder of the railroads' argument consists of a discussion of the individual commodity groups, which they maintain, present no unique basis justifying special treatment. The railroads contend that the present rate structure reflects existing conditions and the rates are currently moving the traffic. Specific evidence relating to the reasonableness of the increase as it applies to the individual commodities will be evaluated in subsequent sections of this decision.

(D) *Conclusion*

We find that while respondents have generally justified the 5-percent increase based on their overall revenue need (see November 10, 1977 order in this proceeding), they have failed to establish that the increase on the commodities under investigation are justified on the basis of the cost of providing the services in issue. This investigation was precipitated by the high rate/cost ratios exhibited by these commodities. In the context of this proceeding cost evidence is important in determining whether the increases on these commodities are just and reasonable. The evidence produced by respondents does not fully jus-

tify the 5-percent increase. However, a lesser increase is justified due to the carriers' overall revenue needs. Taking this into consideration, the increases will not be denied in their entirety, but will be authorized in varying percentages. The majority of the commodities will receive 3 percent with the exception of sodium alkalies, industrial gases, and recyclables. This increase will grant relief to shippers by limiting the increase on these commodities which are already subject to high rate/cost ratios. It should be noted that the proposed 5-percent increase, if authorized, would result in a disproportionate contribution by these commodities, a result not justified by the evidence in this proceeding. At the same time, we are cognizant of the carriers' serious revenue need and the fact that an increase is necessary to present further decline in railroads' overall financial condition. Under the circumstances, we believe that this traffic should bear a share of these revenue needs and that a 3-percent increase is warranted. Any lesser increase would result in a more significant shortfall. In the case of sodium alkalies and industrial gases, shippers have provided persuasive evidence to warrant limiting the increase on these commodities to 2 percent. The majority of the recyclables will sustain only 3 percent of the increase because of the railroads' failure to adequately address the potentially damaging effect of general rate increases on the recyclables' rate structure, as well as the failure to address pertinent cost issues.

We must reiterate that respondents' failure to discuss the relevant factors affecting the rate levels of these commodities in the context of the cost of providing the service was a fatal error in this proceeding, given the initial reason for investigating these commodities. It is a general rule of evidence that the failure to produce available relevant evidence gives rise to the inference that, if produced, this evidence would have been unfavorable to the proponent. If respondents had produced cost evidence on

each of these commodities indicating that the rate/cost ratios exceeded 180 percent, it does not necessarily follow that the rates would have been found unreasonable. Given the totality of the circumstances and the controlling factors in each individual case, the rate levels on different commodities reflecting the same rate/cost ratios may be reasonable in one instance and unreasonable in the other.

This is where we feel respondents have erred in this investigation. However, "the Commission may not arbitrarily fashion a standard [of reasonableness] out of whole cloth." This obligation rests with respondents who must proffer a standard of reasonableness, establish that the desired standard is rational, and prove that they have in fact met the proposed standard.[26] The standard proposed by respondents is unacceptable. It elevates value of service over all other competing criteria traditionally used in determining rate reasonableness. In essence it asks for unrestrained freedom to raise rate levels on certain commodities which can bear these increases and still continue to move, with no maximum limit, except for actual diversion of traffic or total cessation of movement. Evidence adduced to meet this proposed standard of reasonableness is limited to: recitation of existing rate levels (pointing out instances where rates have been reduced or incentive formulas established), tonnage and market share figures indicating that the traffic is still continuing to move via rail, and comparisons with scale rates and the selling price of the commodities. In conclusion, "it is not the duty of the . . . Commission to develop standards for decision making based solely on the needs and/or desires of . . . respondents." [27] The 4R Act has

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[26] Inspection In Transit, Grain and Grain Products, 349 I.C.C. 89, 93 (1975).

[27] *Id.*

not changed this. Its policy includes a balancing of the needs of carriers, shippers, and the public, as well as promoting adequate revenue levels for the railroads.

(E) *Commodities*

(1) *Newsprint, Paper*

Respondents utilize newsprint paper as a vehicle by which to test the validity of the rate/cost ratios contained in the Section 202 Study. As we noted in the section entitled *Test of Reasonableness, supra*, the efficacy of these ratios is not a proper issue since their application is limited to the investigatory stage of this proceeding. Newsprint paper was also the only commodity for which the railroads presented cost evidence.[28]

Respondents contend that the 1975 waybill statistics on which the Section 202 Study is based are currently meaningless in regard to newsprint paper, because the rates on newsprint have been substantially reduced since completion of the study, to meet truck competition. The railroads also added unloading and delivery service on shipments destined to locations not served by private or assigned rail sidings. Therefore, according to the railroads, the Section 202 Study cannot be used to show that more than 50 percent of this commodity moves at rates returning revenue in excess of 180 percent of variable costs. As revenue ratios were the basis for selection of the commodities to be investigated in this proceeding, the railroads request that the Commission discontinue the investigation of newsprint.

While it is true that the railroads have lowered their rates on newsprint since the Section 202 Study was performed, this alone is not persuasive. In an attempt to

[28] The railroads did cite to specific cost findings in Ex Parte No. 319 for the recyclable commodities. These were generally confined to instances of recycables with low rate/cost ratios.

discredit the Section 202 Study, the railroads tested the rate/cost ratio on newsprint paper within the western district and restated the variable cost computations found in the Study on this commodity. Instead of 65.1 percent of the total revenue earned by newsprint being associated with movements which returned revenue in excess of 180 percent, the railroads' results indicated only 47.3 percent. In adjusting the costs, the railroads used a 19.3 percent interest rate on capital in lieu of the normal Rail Form A embedded debt rate of 5.3 percent in Region V, and 5 percent in Region VI. They attempt to justify use of this percentage cost of capital by citing No. 36608, *Incentive Rates on Coal—Cordero Wyoming to Smithers Lake, Texas*, served November 30, 1977, claiming that the Commission there allowed the same cost of capital figure.

Reliance on this decision is misplaced. The methodology used in that capital incentive case employed a proxy test as an indicia of revenue need. As we stated in that decision, the imprecision of the proxy test mitigates against its use as an absolute measure. It was used in *Smithers Lake* for illustrative purposes only. The use of a 19.3-percent interest rate on capital, rather than the normal Rail Form A embedded debt rate results in something other than pure cost and instead yields a cost which includes an "allowance for profit" as described in *Rules to Govern the Assembling and Presenting of Cost Evidence*, 337 I.C.C. 298, 393. This overstates the railroads' costs.[29]

We find that the railroads have not shown that the full 5-percent increase is justified for this commodity. In accordance with our conclusions as stated above, the increase on newsprint paper is limited to 3 percent.

[29] As indicated in Ex Parte No. 338, *supra*, whether any change should be made in treatment of cost of capital will be the subject of a future rulemaking proceeding.

(2) *Sodium Alkalies and Industrial Gases*

The railroads presented the same general argument for the three chemical groups, sodium alkalies, industrial gases and sulphuric acid. For purposes of our discussion, this section pertains to sodium alkalies and industrial gases only. Sulphuric acid will be discussed separately in the following section, due to our ultimate finding that varying percentage levels should be authorized.

Caustic soda is the only major commodity in the group of sodium alkalies. Commodities grouped under the generic description "industrial gases" are: chlorine; acetylene; carbon dioxide; and industrial gases, nec, consisting of 37 commodities, the most prominent of which is vinyl chloride.

The railroads presented the following evidence on the issue of reasonableness. They contend that the rates on sodium alkalies and industrial gases reflect low percentages of first class rates, indicating that the present rate levels are not unreasonably high. The percentages were derived by comparing allegedly representative rates on sodium alkalies and industrial gases to Docket 28300 Class 100 rates. The results range from 4.7 to 31.2 percent of Class 100 rates.[30] The railroads attribute the "low percentages" on these commodities to various general and specific rate reductions made in recognition of market and intermodal competition. In spite of this competition and successive general increases, the railroads maintain that the reasonableness of the rates is indicated by the fact that these commodities continue to move in substantial volume by rail.

[30] The rates selected by the railroads to develop these percentages were generally commodity-column rates for representative Docket 28300 mileage. However, one set of percentages for industrial gases was developed from rates on 20 significant Illinois Central Gulf Railroad movements only. The lowest percentage, 4.7, was obtained from this study.

Percentages of Class 100 rates are generally utilized in the context of rate comparisons. The Class 100 rates are a point of reference against which two or more rates are compared. The disparity between the resulting percentages is used to show how much one rate deviates from the other rate or rates which are being offered as the standard of reasonableness. Illinois Central Gulf (ICG) argues that rates below 10 percent of Class 100 are presumtively low. While it may be true that a rate below 10 percent of Class 100 is a low rate, this is not equivalent to rate reasonableness. No percentage of Class 100 rates has ever been established as an absolute standard of reasonableness. Furthermore, the rates utilized by ICG to arrive at the percentages of Class 100 have not even been shown to be representative of the general level of rates on industrial gases.

The existence of competition is an important element of the railroads' presentation. It is not only given as the reason for the low percentages of Class 100 rates, but also as the motivation for numerous reduced rates and incentive formulas which are offered into evidence to show that the existing rate structures are reasonable.

Sodium alkalies, specifically caustic soda, are alleged to be highly competitive, both in terms of modal and market competition. In the South, modal competition consists of truck competition up to 200 miles and barge competition for longer hauls. In addition, more distant producers of caustic soda have been accorded rates on "recognized market competitive guidelines" to encourage long-haul rail movement. Traffic movement statistics showing tons originated, tons carried and gross revenue per ton between 1967 and 1976, indicate an increase in the railroads' traffic levels, as well as average revenue per ton carried. To illustrate that caustic soda is highly competitive, the Southern Railroad (Southern) developed average rates from total rail movements in 1976, and

compared them with the commodity column scale rates. Presumably, Southern is submitting this comparison for the proposition that the average rate per net ton is lower than the corresponding published commodity-column scale due to competitive conditions.[31]

A somewhat different picture is presented by the Traffic Executive Association-Eastern Railroads for caustic soda rates in the East. The Eastern Railroads cites 24 instances in which they have considered and approved reductions on caustic soda rates predicated on market competition for the year 1976. They admit that truck competition was not a vital factor in the East at that time, but allege that it has been in the past. Statistics are provided indicating that the rail market share increased from 62.2 percent in 1963, to 72.3 percent in 1972. The Eastern Railroads interpret this data to mean that reductions in rail movements during that time period (as shown in their statement) were due to reductions in production, rather than to losses in rail tonnage to competing modes, when viewed in the light of the railroads' increasing market share.

Industrial gases are also considered by the railroads to be highly competitive. ICG provides a breakdown by stations of customers that shipped 50 or more carloads of industrial gases via its railroad in 1976, and their relative proximity to navigable water. They conclude that shippers of industrial gases are favorably located in relation to water so that they are in a position to take advantage of water transportation. ICG also extracted United States tonnage figures for industrial gases, compressed or liquified, for rail, motor, and water carriers, between 1967 and 1974. Although rail tonnage increased overall during this period, there was a decline in the rail

[31] It should be noted that the average rate per net ton is actually higher than the published commodity column scale rates in three instances, according to the railroads' figures.

market share from 57.81 percent of the total movement in 1967, to 41.43 percent in 1974. Water transportation constituted approximately 50 percent of the total movement in 1974. According to ICG, these percentages show that while the railroads have been able to retain their market share, the involved traffic is highly competitive and that shippers of industrial gases are using water transportation. Reduced rates for heavier loading and annual volume rates are cited as measures which ICG has implemented in order to meet intermodal competition. In addition to intermodal competition, ICG states that market competition is particularly intense at origin points. Producers of liquified chlorine gas and vinyl chloride, the largest moving industrial gases within the group, are located principally along the Gulf Coast. ICG shows that the remaining producers of these commodities are widely scattered, necessitating adjustments for market-competitive reasons. ICG gives examples of reduced rates in effect on various movements and their interrelationships in an effort to show that competition is reflected in the rate structure.

The Eastern Railroads break down industrial gases into the most important commodities making up the group. One of the major commodities, chlorine, is considered to be particularly susceptible to motor and market competition. In 1976 and 1977, 59 rate proposals were considered and approved to meet market competition. There were seven rate reductions to meet truck competition and 38 proposals reflecting TEA Formula. Tonnage figures indicate that traffic has remained fairly constant over the years. The inactivity in rate adjustments on acetylene is explained as due to an absence of a regular market. Production of acetylene is centered in the Southwest and it is being replaced by other commodities. Thus, according to the Eastern Railroads there is no need for carriers to lower rate levels to generate traffic. The Eastern Railroads show that there were relatively few proposals

filed for rate adjustments on carbon dioxide, indicating that rate levels are stable and are able to generate tonnages. The Eastern Railroads aver that where adjustments were made, they were designed to meet short haul truck competition. Also, there has been some establishment of jumbo tank car scale rates. Rail transportation of carbon dioxide is now determined to be on the upswing. Because of the size of the group, industrial gases, nec, the Eastern Railroads limit their discussion to what they consider to be the normal level of rates on certain commodities. Statistics indicate that the railroads' share of the market on this traffic has remained fairly constant, between 34 and 35 percent of the total transportation market for the period 1963 to 1972. Refrigerated n.o.i.b.n. or dispersant gases n.o.i.b.n. were initially developed as standard tank-car rates designed to meet severe truck competition. The Eastern Railroads report no requests for rate reductions since the inception of the reduced scale rates. The same is true for anhydrous amines (since 1976) and gases, o.t. There is considered to be no normal level of rates on vinyl chloride. Rates on this commodity are point-to-point and are made in conformity with TEA Formula. In addition, annual volume rates on vinyl chloride, motivated by competition from other modes, have been exempted occasionally from general increases.

Other evidence submitted by the railroads consists of comparisons of the public values of sodium alkalies and industrial gases with the applicable level of freight rates. The selling price of the commodities was obtained from quotations from the *Chemical Marketing Reporter*. These comparisons are submitted to show that any increase in freight rates will have minimal effect on the movement of sodium alkalies and industrial gases and that the rates are reasonable.

In conclusion, the railroads submit that there is no evidence that the level of rates on these commodities

has inhibited their movement by rail or that this increase will cause diversion of traffic. Furthermore, because of the uniform nature of the increase, the railroads foresee no adverse impact from application of the increases to these commodities. They predict that if holddowns are ordered, it will result in disruptions of recognized rate relationships, necessitating additional adjustments, which will further erode rail revenues.

The shippers who submitted statements on these commodities present the rate structure on sodium alkalies and industrial gases in a different perspective. Rather than intense competition, these commodities are characterized as mainly captive to the railroads. Intermodal competition is not considered to be a factor in the case of chlorine, where the percentages of the individual shippers' traffic moving via rail ranged from 80 percent to 100 percent. Although the percentages submitted in the case of caustic soda were less, averaging approximately 67 percent, rail is still considered to be the dominant mode. Water transportation is only seen as a viable alternative where geographical location permits shipments by water and where the volume shipped is high.

Contrary to the railroads' evidence, these shippers submit that rail rates constitute a substantial portion of the delivered price of chlorine and causic soda. They object to the railroads' reliance on list prices to determine the value of the commodities. The Chlorine Institute notes other deficiencies in the railroads' computations and restates the figures as follows: rail rates are 25 percent of the value of chlorine and 28.6 percent of the value of caustic soda.

Shippers of these commodities emphasize that the majority of the traffic moves in shipper-owned cars. The substantial investment in jumbo tank cars is seen as a direct benefit to the railroads for which they have not

been adequately credited through sufficiently high mileage allowances or a reduced level of rates.

We would like to point out that this is not the proper forum to litigate the issue of mileage allowances. However, the investment made by the shippers is relevant in a determination of the carriers' costs.

The Chlorine Institute and certain other parties submitting statements on chlorine and caustic soda presented cost evidence, in addition to discussing other relevant factors relating to reasonableness. The Chlorine Institute's cost study was based on information provided by nine of its 16 member shippers. Costs were developed for 78 movements of chlorine and 88 movements of caustic soda, handled by the Institute's members during 1977. It is alleged that these movements are representative of the chlorine and caustic soda traffic throughout the United States. The results indicate that the ratios of revenue-to-variable cost for the selected movements of chlorine range from 215 to 386 percent and from 146 to 243 percent in the case of caustic soda. The Chlorine Institute's costs are slightly overstated due to its failure to adjust terminal costs downward to reflect switching performed by the shippers. Even if this deficiency were corrected, the traffic on chlorine and caustic soda would be even more compensatory than was shown by the Institute. Although it did not demonstrate that the movements costed are statistically representative of the involved traffic, it avers that its members are responsible for shipping approximately 85 percent of the chlorine and caustic soda transported in the United States each year. In addition, it used 9 of its 16 members and developed costs for a total of 166 movements. These are indications that the rate-to-cost comparisons are representative of chlorine and caustic soda on a nationwide basis and that these comparisons represent a reasonable, if somewhat conservative approximation of the compensatory nature of these two

commodities. Other cost data presented by the parties cannot be accepted since the individual costs cannot be construed as representative nationwide, or contain other deficiencies in costing methodology.[32]

In rebuttal, the railroads argue that the shippers' concern is with the basic rate structure which is outside the scope of this investigation. They point out the deficiencies in the shippers' cost studies. The railroads contend that the nature of the movements of these commodities entails substantial expense because they are hazardous materials, and that this was not taken into account in the shippers' cost studies. We would like to point out that the railroads did not choose to discuss this factor in their initial argument but rather they have introduced this evidence in the context of their reply to the shippers' cost studies. Although susceptibility to loss or damage is a cost factor to be considered in determining the reasonableness of rates on particular commodities, it is essential that the approximate percentage this factor represents of the transportation charge be known. The railroads have submitted mere assertions that the costs involved are considerable and immeasurable. They have not even provided basic cost figures approximating their total costs from which to determine what percentage the risk element represents of the whole. For example, loss and damage

[32] For example, Air Products and Chemicals, Inc. submitted rate/cost ratios associated with four of its carload movements of liquid oxygen and liquid nitrogen. In addition to the fact that these examples have not been show to be representative of this shipper's traffic or nationally representative, the study contains other deficiencies. The costs are understated since costs applicable to loss and damage were not included. Also, the current level to which costs were indexed was not defined and the update ratio used is significantly lower than the ratios developed by the Commission to index 1974 costs to July 1977 level. A further deficiency contained in this shipper's updating procedure is that the update ratio which it applied is the same for all territories which is clearly erroneous since expense increases are not uniform throughout the country.

claims on particular commodities or, if those are unavailable, expert testimony regarding the costs involved in dealing with an accident involving these commodities could be presented.

Based on the evidence submitted we find that the railroads have failed to show that the 5-percent increase on these commodities is just and reasonable. However, as already stated in our conclusions, we will not deny the increases in their entirety in recognition of the carriers' revenue need. Furthermore, in light of the evidence presented by shippers of these commodities, we feel that a further reduction of 2 percent is warranted. Specifically, the cost evidence presented by the Chlorine Institute indicates that permitting an increase above that level is not justified on this record.

(3) *Sulphuric Acid*

As we already noted, the railroads' general argument on surphuric acid is the same as for sodium alkalies and industrial gases. Individual railroad lines, however, stress market competition as the controlling factor in the case of sulphuric acid.

The railroads depict the sulphuric acid rate structure as a balance of specifically negotiated rates established to allow producers to reach markets on a competitive basis. A breakdown of the surphuric acid plants in the United States, including their capacity and effective marketing radii, is provided to demonstrate how the individual markets in surphuric acid overlap. The railroads submit that this structure is further complicated by the addition of new sources of sulphuric acid. Copper manufacturers are increasingly entering into the production of surphuric acid as a means of disposing of sulfur dioxide emissions, necessitating additional competitively based rates. The railroads maintain that any limitation on the increase on surphuric acid is unnecessary because they

will adjust rates in accordance with market competitive conditions and because a hold-down will result in the disruption of established rate relationships. It should be noted that information provided by the Eastern Railroads cites only 16 proposals for rate reductions on sulphuric acid in the East considered and approved in a two-year period, from January 1, 1976, to December 30, 1977. Of this total, only three rate reductions were predicated upon market competition and only two were truck compelled. This inactivity is explained by the railroads as due to lack of shipper interest. Specifically, two proposals for adjustments in tank car rates within official territory, that would allegedly have resulted in substantially reduced rates at 190,000 pounds, were not "favorably progressed because of lack of shipper interest." It is claimed that affected shippers indicated that those reduced rate levels would not have captured additional rail traffic.

Tonnage and revenue figures are provided to show that the railroads are handling a substantial and increasing amount of sulphuric acid under the present rate structure. On a national basis, the percentage of sulphuric acid transported by the railroads has increased slightly from approximately 33 percent in 1970, to 34 percent in 1974. Translated into actual figures, tonnage increased from approximately 3,600,240 to 4,239,505 tons. The railroads conclude that these figures show that general increases have not diminished rail tonnage and that effective competition exists, since only one third of the sulphuric acid moves via rail in the United States. These nationwide figures were updated with tonnage figures from the individual territories which follow the same general pattern.

As a general proposition, the railroads maintain that there are many factors other than the rate level which could affect the volume of movement of surphuric acid, such as fluctuations in the remand for the primary prod-

ucts which utilize sulphuric acid, and general business conditions.

The Eastern Railroad compared representative sulphuric acid rates in eastern territory with Class 100 rates. The results range from 8.9 to 16.2 percent. (See pertinent discussion in section on *Sodium Alkalies and Industrial Gases, supra.*)

A comparison of the general level of rates within southern territory for representative distances with the general level of rates within official territory and the guideline scale used to establish specific 180,000 pound rates within southwestern territory was also submitted. The comparison shows the general level of rates on sulphuric acid within southern territory to be the lowest of any general level in Docket 28300 territory. The general level of rates is cited as the applicable rates on most of the tonnage which moves via rail in the South, although specific point-to-point and annual volume rates have been published to meet certain competitive conditions. Tonnage figures for southern district rail carriers show that while carloads have declined, the tonnage carried has remained fairly constant, indicating a trend toward use of larger equipment. The figures also show that southern district carriers are handling a substantial volume of the sulphuric acid traffic.

Railroad evidence of increasing market share is disputed by one shipper who alleges that the rail carriers are steadily pricing themselves out of the sulphuric acid market. This conclusion is based upon an analysis of sulphuric acid originations by rail and truck from 1969 to 1974 (excluding 1971).

The railroads emphasize the existence of market competitive relationships. They aver that they will continue to adjust the level of rates on sulphuric acid and, therefore, a limitation on the increase is not warranted. [It is

well settled that a mere promise that rates will be adjusted, even though made in good faith, is not indicative of the reasonableness of rates.] In addition to market competition, the railroads argue both effective modal competition and lack of diversion, as shown by tonnage and revenue figures. The comparisons of sulphuric acid rates among the territories and with Class 100 rates are presumably submitted to show that the level of rates is low and thus, reasonable. As we noted in our *Conclusion, supra*, these factors alone are not sufficient to establish reasonableness. From the evidence we know that rates are established in recognition of market competition. Thus, presumably shippers are not competitively disadvantaged by the rate structure. Although the rates may be similar, is the level unreasonably high? The general level of rates is provided as well as examples of point-to-point and annual volume rates. Although we are aware of what the approximate rate level is and the railroads' increasing, but not predominant market share, we do not feel that the carriers have shown that a 5-percent increase on sulphuric acid is reasonable. Accordingly as noted earlier, the increase will be limited to 3 percent.

(4) *Rubber, Natural or Synthetic*

A preliminary question is the argument by Dow Chemical U.S.A. that styrene-butadiene is not liquid rubber and, therefore, should not move at rates applicable on rubber. This is a classification question which we believe can more appropriately be resolved in a context other than a general increase proceeding.

In regard to the rate increase, the railroads state that rubber can sustain the full amount of the increase because freight rates are generally less than 3 percent of the product value. Dow Chemical replies that rates on Styrene-butadiene latex are as high as 11 percent of the commodity's selling price.

Dow also emphasizes that for synthetic latex, rates have increased much faster than the value of the commodity. Dow states that between June 1974, and the present, railroad costs increased $167.20 while rates went up $360.00 per shipment. While the price of latex increased by 2.5 percent ($.01 per pound), cumulative rail increases totaled 41.8 percent. Dow adds that during 29 months of that period, latex suffered a price decrease of $.02 per pound. Dow states that such market conditions prevent freight rate increases from being passed on to customers.

Concerning rate/cost ratios, Dow's statement contains a comparison of synthetic latex rates and variable costs applicable to the movement of 80,000 pounds of synthetic latex in 10,000 gallon tank cars traveling 500 miles in official territory. The results of Dow's comparisons indicate that the cost/revenue relationship for the given movement of synthetic rubber was 210 percent at the end of 1974, and 215 percent at the end of 1977.

Dow also shows revenues and variable costs for synthetic latex moving within the western trunkline territory. Dow claims that the market for latex in this territory is concentrated in central Wisconsin and Minnesota. Dow's evidence for this area indicates that for Wisconsin Rapids, the present rate is 471 percent of variable cost and for Brainerd, MN, the present rate is 418 percent of variable costs. For southern territory, Dow's presentation shows that the involved rates within that territory are below, or only slightly exceed 180 percent of the variable costs.

The railroads object to the lack of supporting detail in Dow's presentation. They state that more information concerning such characteristics as type of train, circuity, and number of interchanges is required. Although Dow's cost methodology does contain certain deficiencies these deficiencies are relatively minor. While Dow has failed to demonstrate that its cost evidence is representative of

the movement of synthetic latex on a nationwide basis, it does provide some indication that the rates on all synthetic matter movements are high, at least in Western territory.

Other evidence was submitted by the railroads to show that synthetic rubber moves freely under the present rate structure. Southern Pacific (SP) states that synthetic rubber tonnages did not decline between 1970 and 1976. The Eastern Railroads indicate that traffic increased as a result of a decrease in rates that went into effect in 1973. Average revenue on synthetic rubber for Southern has increased less than on all traffic, except synthetic rubber, while total tons and total revenue for both synthetic and natural rubber have increased.

The railroads also emphasize that many rate adjustments have been made to meet water and truck competition. Much of the traffic moves at incentive loading rates using cars that have been specifically assigned to individual producers. These cars are returned empty without additional charge along with the specially designed shipping containers for reloading. The Eastern Railroads also state that since January 1, 1976, they have approved 65 rate reductions for these commodities.

On the other hand, Dow states that jumbo cars and, therefore, many of the lower rates, often cannot be used. It contends that some plant facilities have storage capacities geared to smaller quantities. Since these facilities are often old, the capital investment required to increase storage capacity is not justified. Also, jumbo cars may create unloading problems since all unloading must be done at once or the product becomes contaminated.

The railroads' evidence is similar to that presented for the majority of the commodities. We conclude that it is not sufficient to establish the reasonableness of a 5-percent rate increase and, therefore, limit the increase to 3 percent.

(5) *Manufactured Iron or Steel*

Steel manufacturers, referring to the depreseed state of the steel industry, argue that the highly compensatory steel traffic should not take the same rate increase as less compensatory traffic. They cite the following rate/cost ratios from the Section 202 Study: 72.9 percent of steel moves at rates in excess of 160 percent of variable costs; and 58.1 percent moves at rates in excess of 180 percent of variable costs.

The Eastern Railroads, which handle the vast preponderance of this rail traffic, emphasize the importance of iron and steel to the railroads. The railroads argue that an above-average contribution is required from these commodities because of high railroad capital investment in specialized steel-hauling cars. For example, special-purpose hooded coil cars that move 95 percent of the Eastern Railroad coiled steel traffic cost $37,500 per car, while plain box cars cost $28,400 each. Also, the special purpose cars allegedly have virtually 100-percent empty return.

The railroads also state that rates have not increased as much as have finished steel prices. Thus, the ratio of average rail revenue per ton to average mill price per ton has declined over the period 1964, to 1976.

Concerning the possibility of diversion of traffic, the railroads cite numerous examples of past rate adjustments made to meet modal competition. In 1972, the Eastern Railroads reduced mileage scale rates 8 to 20 percent to meet truck competition. Several general increases provided more favorable treatment for iron and steel products than for most other commodities in general. The Eastern Railroads also cite 460 individual rate adjustments made since January 1, 1972.

Some of the shippers dispute the railroads' claim that rail rate policies are maintaining traffic volumes. Bethlehem Steel Corp., for example, states that while the railroads carried 36-37 percent of the steel traffic between 1971 and 1975, this percentage dropped to 30 percent in 1976. The railroads reply that most of the reduction has been in rail-oriented steel products, rather than in products subject to motor competition, thus implying an industry-related, rather than a rail-related cause. United States Steel argues that the fact that there have been numerous point-to-point adjustments is not operative because these adjustments have been eroded by subsequent general rate increases.

The railroads also argue that the rate increase is necessary to prevent distortion of the rate structure on iron and steel commodities. The railroads state that they cannot meet their revenue needs by increasing only the lower-rated or less profitable rates on iron and steel. They also argue that a fragmented rate increase would burden short-haul rates from the closest producing mills taking the full increase, while exempting the more profitable long-haul rates. This would contrast with the usual railroad-pricing policy designed to maintain market-competitive relationships.

Some of the shippers urge all of the railroads to exempt iron and steel from the increase since certain railroads have already done so. However, those railroads granting exemptions transport only a minor portion of the iron and steel traffic in the country.

U.S. Steel also argues that steel is being prejudiced because an exemption has been granted for aluminum, moving from southern freight association territory and southwestern lines territory to official territory. Steel and aluminum compete heavily in automotive applications, farm implements, and containers. U.S. Steel states further that aluminum has been preferred in other general rate increases. The Eastern Railroads dispute the extent to which the commodities compete, and submitted evidence

to show that the rates on steel and aluminum are not related.

To support its contention, U.S. Steel submitted cost scales by mileage and weight bracket based on unadjusted regional average costs. The evidence is insufficient to show prejudicial treatment of steel. If specific and separate adjustments had been made to reflect the actual transportation characteristics of the two commodities moving in representative point-to-point traje patterns, U.S. Steel's evidence would have been more convincing. Furthermore, the update procedure which it utilized is improper. Costs should not be updated based on percentage increases allowed in general rate increases since the two are not necessarily related.

In past general increase proceedings we have held that because of the various differences in transportation characteristics, no relationship between aluminum and iron and steel exists. *Increased Freight Rates and Charges-1976*, 355 I.C.C. 254, 378 (1976). There is no evidence on this record upon which we can reach a contrary result.

After analyzing all of the evidence submitted in this proceeding concerning manufactured iron and steel, we conclude that respondents have not shown that the full rate increase is just and reasonable for these commodities. The railroads have stated, for example, that some steel is hauled in specialized cars requiring considerable capital expenditures. However, they have not indicated the percentage of all manufactured iron and steel that requires specialized cars, nor have they shown the total amount of additional cost attributable to these cars. Respondents also stated that the ratio of rates to steel prices is declining.

However, as previously indicated, the railroads have already shown that revenue needs justify a general increase. Manufactured iron and steel increases would provide a significant portion of the additional revenue

needed, particularly in the East. Therefore, we will authorize an increase of 3 percent on this commodity.

(6) *Recyclables*

Recyclables were selected for investigation because of the Commission's continuing responsibility under the 4R Act to consider the effect of general rate increases upon the transportation of recyclable commodities.

As was the case with most of the other commodities under investigation, the railroads did not submit cost data on recyclables. The evidence pertaining to each commodity is summarized below. The Commission has an ongoing responsibility under section 204 of the 4R Act to investigate recyclable rail rates as appropriate. The Congressional focus of this provision requires the strictest scrutiny of the evidence presented. On balance, particularly in view of the railroads' failure to adequately address the potentially damaging effect of general rate increases on the recyclables' rate structure, we are convinced that an increase of no more than 3 percent is warranted. Because of the carriers' revenue need, we believe it necessary that these commodities bear a share of these revenue needs and accordingly, authorize a 3-percent increase.

The National Association of Recycling Industries, Inc. (NARI), filed a general statement discussing the following commodities: aluminum residue; aluminum scrap; miscellaneous metals; copper scrap; copper matte; lead and zinc scrap; zinc dross; recyclable rubber; waste paper; and textile waste. NARI states that most of the rate/cost ratios on these commodities exceed the average ratio of 131.8 percent for all rail traffic. NARI also states that generally the ratios for these recyclables exceed both the 160 percent market dominance cost presumption and the ratios for competing virgin commodities. NARI argues

that the total increases authorized for recyclables since 1973 (38.3 percent) violates Congressional directives that discriminatory rates for recyclables be eliminated. The fact that the increases on recyclables in Ex Parte No. 305-RE, *Increased Rates and Charges, Recyclable Materials, 1975*, served August 25, 1977, and Ex Parte No. 313, *Increased Freight Rates and Charges, Labor Costs, 1975*, served June 5, 1975, were remanded to the Commission is offered as support for this argument. NARI contends that it is unjust to increase rates on recyclables for the following reasons. First, lower rates are in the national interest. Second, holddowns have been allowed for other commodities. Third, the recyclable industry is in generally poor condition. Fourth, the revenue loss to the railroads by a holddown on these commodities would be insignificant.

(a) *Commodities to be investigated in other proceedings*

The Commission by order dated December 1, 1977, instituted Ex Parte No. 319 (Sub-No. 1), Further Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials. Some of the commodities [33] being investigated here are also being investigated in that proceeding. Since the issues are basically the same, we conclude that the final determination of the lawfulness of the general increase on these commodities should be held in abeyance pending conclusion of the investigation in Ex Parte No. 319 (Sub-No. 1).

(b) *Copper concentrate (STCC 10 212)*

Both shippers and the railroads submit that copper concentrate is not a recyclable, but an intermediate product in the processing of copper ore. We agree, and accordingly, delete copper concentrate from the list of recyclables under investigation in this proceeding.

[33] Bakery refuse (STCC 20 511 18); food scrap, West only (STCC 40 23); copper matte, South only (STCC 33 312); lead matte, South only (STCC 33 322); misc. nonferrous metal residue, South only (STCC 33 398); municipal garbage (STCC 20 291 14); bags, old (STCC 411 114 34); bags, old, value for conversion (STCC 41 115 80); waste, calcium sulfate (STCC 28 719 40); and chemical or petroleum waste (STCC 40 25).

(c) *Beverage containers, returned empty (STCC 42 111 42); shipping containers or devices returned empty (STCC 42 1, except 42 111 42); wood scrap, except for the West (STCC 40 23); shavings or saw dust (STCC 24 293); tin scrap (STCC 40 219 60); and rubber or plastic scrap or waste (STCC 40 26)*

The Commission found that the increases on these commodities in Ex Parte No. 319 would not affect their movement (and therefore would not adversely affect the environment) and that the rates were just and reasonable. The evidence in Ex Parte No. 319 indicated that the rate/cost ratios on these commodities were not unduly high. For example, the ratios on beverage containers were 69 percent in the East, 55 percent in the South, and 64 percent in the West. The highest ratio for any of these commodities was 173 percent for shipping containers transported in western territory. It was found that industry factors rather than the level of freight rates affect the movements of these commodities. For the reasons previously indicated, only a 3-percent increase is warranted here.

(d) *Reclaimed rubber (STCC 30 3); cullet (STCC 32 299 24); copper matte, except for the South (STCC 33 312); aluminum residue (33 342); ashes (STCC 40 1); lead, zinc, or alloy scrap (STCC 40 213); and misc. nonferrous metal residue, except for the South (33 398)*

The decision in Ex Parte No. 319 indicated that the rate/cost ratios for these commodities were relatively high. For example, the ratios for copper matte were 237 percent in the West and 189 percent in the East; for aluminum residues, 431 percent in the East; and for lead, zinc, or alloy scrap, 186 percent in the East and 226 percent in

the South. Reductions of varying percentages were ordered for all of these rates, except lead, zinc, or alloy scrap.

No mitigating evidence has been presented in this proceeding to show that the rates on these commodities are now just and reasonable and are not impeding the flow of traffic. Particularly in the case of lead, zinc, or allow scrap, the railroads have submitted no evidence to show that the full 5-percent increase would not exceed a maximum reasonable level. The majority of these rates, however, have been reduced by varying amounts in accordance with the order issued in Ex Parte No. 319. In light of these reductions and the railroad's revenue need we will limit the increase on these commodities to 3 percent.

(e) *Iron or Steel (STCC 40 211)*

Three parties objected to a rate increase on scrap iron and steel. At least one party requests that the Commission not grant a greater increase (in cents per ton) on ferrous scrap than is applied to iron ore, which is alleged to be a competing product.

The Institute of Scrap Iron and Steel (ISIS) contends that the full amount of the increase should not be applied because much of ferrous scrap moves at rates greater than 180 percent of variable cost. Citing the Section 202 Study, ISIS states that approximately 37.8 percent of the revenue earned by ferrous scrap is in excess of 180 percent and that the rate/cost ratio for virtually half of official territory scrap iron movements (which accounts for more than two-thirds of scrap iron hauled) exceeds 160 percent.

The railroads reply that rates on 27.9 percent of the traffic, nationwide, are below variable cost, and 17.9 percent return less than 60 percent of variable cost. The railroads submitted evidence showing that most ferrous

scrap moves relatively short distances. They argue that the higher cost short mileage blocks should be weighted more heavily.

The Chicago and North Western Transportation Company also cites the following rate/cost ratios found in Ex Parte No. 319 on iron scrap and iron ore, respectively: 162 and 139 percent in the West; 150 and 218 percent in the East; and 170 and 88 percent in the South. Northwestern Steel and Wire Company states that there is already a substantial spread between scrap iron and iron ore rates and that this disparity will intensify with a uniform application of the increase. ISIS argues that potentially 110,000,000 net tons of scrap iron could have moved had not the rate structure, as affected by rate increases since Ex Parte No. 295, not favored iron ore over scrap iron.

This estimate is unacceptable for two reasons. First, it is based upon the premise that the proper rate for ferrous scrap is 1.5 times the rate of iron ore, reflecting the relative metallic contributions of scrap and ore in the production of one ton of steel. Such a rate relationship does not consider transportation characteristics and has never been endorsed by this Commission. Second, the tonnage was calculated using an elasticity of demand of —.083. While ISIS states that this figure was based on the materials presented in the Final Environmental Impact Statement in Ex Parte No. 319, it does not explain how it arrived at the final figure. The Commission's own elasticity of demand estimate in Ex Parte No. 319 was —0.075. Also, when all factors affecting the demand for scrap were considered, the Commission found, on a qualitative basis, that there was no indication that the flow of scrap was being impeded by the level of rail rates.

In reply to the argument that rail rates favor iron ore over scrap, Southern states that ore shipments have been

declining while scrap shipments have been increasing in the South. The Chicago and North Western submitted statistics for the years 1962 through 1976, showing that there is a close correlation between scrap consumption and steel production, but no similar relationship between scrap consumption and freight rates.

The parties disagree about the quantity and significance of the construction of scrap intensive electric furnaces. While the railroads emphasize that use of the electric furnace has increased, ISIS argues that use of the iron ore intensive basic oxygen furnace method has grown more rapidly. The railroads reply that while electric furnaces need a scrap input of 96.8 to 99.7 percent, even ore furnaces require at least 27.8 to 30.1 percent scrap input.

The representations concerning transportation characteristics are similar to those made in past proceedings. The railroads emphasize that scrap requires special handling because of the following factors: most scrap moves in single car shipments; back-hauls associated with scrap are less than those associated with iron ore; loading scrap causes considerable damage to the cars; and most scrap moves short distances. In rebuttal, shippers of scrap maintain that no special handling is required. Damage claims are reported to be non-existent. Shippers state that only the cars that are in a poor state of repair are used to haul scrap. Furthermore, the cars that are used are not specialized and can be used alternatively by the railroads to transport many other kinds of traffic. Railroad service in many respects is considered to be very poor.

Regarding the level of rates on scrap, shippers state that application of the full 5-percent increase would equal a 3-year increase in rates of 53.6 percent (noncompounded). The Eastern Railroads point out that new scale rates went into effect in July 1977, reflecting reductions of 9 to 31 percent. The railroads also state that

numerous point-to-point reductions have been made ranging from 2.2 to 37.7 percent. In regard to general rate increases, the railroads argue that this traffic was preferred in Ex Parte No. 295 and Ex Parte No. 310.

Tonnage figures produced by Southern show that the percentage which scrap iron comprises of all carload traffic originated by Southern carriers has increased from .55 percent in 1958, to 1.06 percent in 1976. The percentage of scrap iron revenues to all southern freight revenues increased by a lesser amount, from .57 percent in 1958, to .98 percent in 1976. Southern contends that the fact that scrap iron had a growth rate 7.4 times greater than the growth rate for all traffic in the South between 1967, and 1976, implies that the level of rates is not hindering the flow of traffic.

The issues raised here have been considered by the Commission in several prior proceedings. *See, Increased Freight Rates and Charges, 1972*, 346 I.C.C. 88, 148-160 (1973); Ex Parte No. 319, *supra; Increases in Freight Rates and Charges to Offset Retirement Tax Increases, 1973*, 350 I.C.C. 673, 754-763 (1975). In those cases freight rates were not found to be a factor in the consumption of scrap. The evidence submitted in this proceeding indicates that these findings are still valid. The railroads statistics showing that the level of scrap consumption varies consistently with the level of steel production and is not related to rate increases support this interpretation. While it is true that some of the traffic results in rate/cost ratios higher than 180 percent, other traffic is below variable costs. However, considering all of the evidence, we find that a 3-percent increase is justified for scrap iron and steel.

(f) *Blast furnace products (STCC 33 119)*

Railroad evidence indicates that this traffic has increased significantly since 1967. The railroads argue

that rates on these products are established for specific movements and, therefore, should not be exempted from the general increase. In regard to fly ash, Halliburton Company states that this particular commodity is extremely low in value and that most of it must be discarded because of lack of buyers. The Company also alleges that most of its supply is shipped by truck because of the lower rates. In reply the railroads explain that the shift to truck occurred only when new generating plants went into operation, resulting in short-haul traffic. Furthermore, they submit that according to the shipper's own figures, rail rates are still lower than truck rates at 200 miles, averaging 9½ percent of first class. However, for the reasons set out above, we are convinced that only a 3-percent increase is warranted. Commission ultimately found the effects of freight rates on all blast furnace products to be insignificant. Since an additional 5-percent increase will not bring these rates above a reasonable level, and since there will be no adverse environmental effect from such an action, we conclude that the increase is justified.

(g) *Lead matte, except for the South (STCC 33 322; and zinc dross and residue (STCC 33 332))*

Lead matte is subject to new lower rates between points in official territory. Reductions range from 15.7 to 25 percent. In addition, rates on zinc dross were reduced 20 percent in southern territory in accordance with the final order issued in Ex Parte No. 319. The Eastern Railroads have also made point-to-point reductions for zinc dross. However, no effort has been made to address cost issues or to consider in any depth the effect of general rate increases on this rate structure.

(h) *Brass, bronze, copper, or alloy scrap (STCC 40 212)*

The railroads contend that tonnage fluctuations with economic activity and not with changes in the freight

rates. The railroads submitted data showing the ratio of rate to selling price of these commodities, i.e., 2.7 percent in the South; 1.6 percent in the East; and 1.23 to 2.48 percent in the West. The Eastern Railroads state that for all nonferrous metal scrap except zinc dross, new rates encompassing reductions ranging from 15.7 to 25 percent have been established. The little evidence presented indicates that a 3-percent increase is warranted.

(i) *Aluminum or alloy scrap (STCC 40 214)*

Very little evidence was offered on this commodity. The Eastern Railroads state that some point-to-point reductions have been made in the rates on this commodity. Union Pacific cites Ex Parte No. 319 to show that the rate/cost ratio in the West for this commodity is well below 180 percent. The Aluminum Association, Inc. contends that more favorable rail rates could result in increased movement of this commodity which would ultimately lead to energy savings. This is because the amount of energy required to convert aluminum scrap into aluminum ingot is approximately 5 percent of the energy required to convert bauxite ore into aluminum.

The rate/cost ratios found for aluminum alloy scrap in Ex Parte No. 319 were 177 percent in the East, 161 percent in the West and 184 percent in the South. The evidence indicates that a 3-percent increase is warranted.

(j) *Textile waste (STCC 22 941, STCC 22 973, STC 22 994, and STCC 40 22)*

The railroads submit that the virgin commodities which compete with textile wastes took the full 5-percent increase. While the index for the revenue per ton for all traffic increased 87 percent since 1967, the index on textile traffic increased only 59 percent. The Atchison, Topeka, and Santa Fe Railroad stated that a one-percent waybill sampling showed that approximately 54 percent of the

total tonnage moved at rates which did not produce sufficient revenue to equal 100 percent of variable costs, and that only 8.7 percent had a ratio exceeding 180 percent. The Eastern Railroads stated that 6.3 percent of the textile traffic is at ratios over 180 percent for the United States. For the reasons mentioned above, a 3-percent increase is warranted.

(k) *Paper waste or scrap (STCC 40 241)*

The railroads' evidence indicates that although there have been year-to-year fluctuations in volume, tonnages of waste paper transported by the railroads have increased over the last decade. The railroads argue, therefore, that rate increases have not affected the demand for this commodity. More specifically Southern states that the greatest portion of growth in scrap paper has in fact taken place during the present inflationary period which is characterized by repeated general increases. Using price as a measure of demand, ATSF submits that the wholesale price index for scrap paper has fluctuated sharply, indicating that factors other than rail cost influence demand.

Railroads and shippers agree that motor carriers transport the majority of waste paper moving in this country. One reason is because waste paper is usually collected in cities, where truck loading is required. Also, as pointed out by shippers of waste paper, rail rates tend to be higher than truck rates for this commodity. Some of the railroads, including Conrail, have published lowered incentive rates in an effort to meet this competition.

In regard to rate/cost ratios, the railroads' data indicates that 6.3 percent of waste paper shipped by railroad in the United States had a rate/cost ratio over 180 percent. The railroads also stated that 20.3 percent of the waste paper traffic fell in the 131 to 160 percent

range, 36.7 percent in the 101 to 130 percent category, and 31.9 percent was below 100 percent.

Fort Howard Paper Company submitted evidence similar to that discussed in Ex Parte No. 319. Stating that rate/cost ratios are much higher for waste paper than for virgin woodpulp, Fort Howard argues that the Commission is not giving sufficient regard to environmental considerations. Furthermore, Fort Howard argues that in the last few years the Commission has permitted cumulative rate increases of more than ⅓ on recyclables through general increases. Some of these increases did not apply to the natural resource counterparts of waste paper, thus allowing an increased disparity in the rates. Concerning the railroads' statement that shipments of waste paper are not affected by rate increases, Fort Howard states that the critical question is not whether the railroad tonnage has increased, but rather how much of an increase there would have been absent the general increases. As in the case of the other recyclables, the evidence warrants only a 3-percent increase.

(F) *Order*

It is ordered:

Respondent railroads, insofar as they participate in the traffic and have increased their rates or charges as authorized in the Commission's orders of November 10, 1977, and November 30, 1977, shall cease and desist on or before July 20, 1978, from collecting rates increased to a greater extent than found just and reasonable in this decision and shall promptly refund to the parties entitled thereto, any amount due under refund provisions applicable to these increases.

As noted in our order of November 10, 1977, the record in this prceeding presents no new information, studies, or critiques which would warrant conclusions different than those reached in regard to the increases in recyclable rates in Ex Parte No. 295 (Sub-No. 1), *Increased Freight Rates and Charges, 1973—Recyclable Materials,* and Ex Parte No. 319, *supra.* In those cases the increases in recyclable rates were found to have a small, and insignificant impact on the environment profiles in the recycling industry, since non-price factors were found to be more important than changes in freight rates. Generally, this investigation shows that this is also true for the increases on the recyclables in this proceeding. Therefore, we reiterate our finding in our November 10, 1977, order that this action will not significantly affect the quality of the human environment.

The respondent railroads are hereby required to cancel the schedules placed under investigation by the order served November 10, 1977, to the extent not approved herein, on or before July 20, 1978, upon not less than 10 days' notice to the Commission and the general public by filing and posting in the manner prescribed by the Commission under the Interstate Commerce Act, without prejudice to the establishment and maintenance of schedules in conformity with the findings herein.

Further changes in freight rates and charges, to the extent authorized herein, may be made effective upon not less than 10 days' notice to the Commission and the general public, by filing and posting in the manner prescribed in the act.

Outstanding orders in other proceedings are hereby modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized.

All tariff schedules changing interstate rates or charges under the authority of this order, which rates or charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order.

SUPPLEMENTAL FOURTH-SECTION ORDER NO. 20536

The Commission by Fourth-Section Order No. 20536 authorized carriers parties to the proceeding, Ex Parte No. 343, *Nationwide Increased Freight Rates and Charges, 1977,* to establish and maintain the increased rates and charges described therein without observing the provisions of section 4 of the Interstate Commerce Act.

The carriers parties to the proceeding applied for relief from the provisions of section 4 of the act necessary to establish the rates and charges sought. The increases in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate of intermediate rates or charges subject to the act, in contravention of section 4.

Therefore, the Fourth-Section Order No. 20536, entered as aforesaid is hereby, modified and amended by adding thereto the following paragraphs:

The carriers subject to the Interstate Commerce Act and parties to said proceeding are hereby, authorized to depart from the provisions of section 4 of the act to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 343 of this date.

The carriers parties to said proceeding are hereby, authorized to establish and maintain rates and charges authorized in order of this date, without observing the long-and-short-haul provisions of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in said proceeding.

In those instances in which rates in contravention of section 4 are established under authority contained herein, the schedules containing such rates shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION NO. 77-5350 AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

Special Permission No. 77-5350 is hereby amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions, and limitations therein.

In all other respects, the terms of the original permission, as heretofore amended, shall remain the same.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Gresham, and Clapp, Commissioner Murphy concurring in part, Commissioner Gresham concurring.

NANCY L. WILSON
Acting Secretary

[SEAL]

COMMISSIONER MURPHY, concurring in part:

The majority proposes to impose holddowns on some six commodities, among others, from the proposed 5 percent increase to a 3 or 2 percentage basis. The imposition of these flat percentage holddowns will affect a substantial portion of respondents' estimated revenues. I believe a more moderate approach would be more appropriate. It should be recognized that the increases authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370.

The majority cautions respondents as to their continued reliance on general increases to secure added revenues. I am in accord with that admonition. Nevertheless, I believe that for some period until the respondents become familiar with the regulations in Ex Parte No. 290 and assume the initiative in proposing separate changes in rates that reliance on general increases may be appropriate.[1] In that respect, however, the general increases proposed need not be a single flat percentage general increase but may more appropriately take the form of the selective general increases as proposed in *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290.

[1] See, my separate expression in Ex Parte No. 349, *Increased Freight Rates And Charges, 1978, Nationwide*, served June 7 and June 8, 1978.

COMMISSIONER GRESHAM, concurring:

I fully support the results reached and the reasons set forth in this investigation. Recent experience, however, dictates a separate expression on my part. I have difficulty reconciling this decision with the conclusions reached by the majority of the Commission in Ex Parte No. 349, *Increased Freight Rates and Charges—1978*, (served June 8, 1978). I take issue with the definition of "selectivity" as contemplated in that decision and to be applied by the decision today. The majority would exclude selectivity in general increase proceedings absent a showing of compelling circumstances. In light of the Commission's obligations under the 4-R Act to assist carriers in attaining adequate revenue levels, I am not persuaded that we have chosen a proper course in excluding selectivity from general increase procedures. The standard adopted by the majority, i.e., "compelling circumstances," appears to be a luxury we cannot afford.

General increases have been characterized by flagouts and holddowns in the past. Carrier management should have the flexibility to look to specific broad descriptions of traffic to bear a reasonable but higher portion of revenue needs. As demonstrated by the decision today, any such effort by management, of course, is subject to the Commission's power to suspend and/or investigate. While exceptions to such pricing flexibility would have to be made (as in the case of capital incentive rates filed under Section 15(19) of the Interstate Commerce Act), I believe the Commission has erred in limiting upward selectivity to so-called individual rate adjustments.

While the majority's reference to "compelling circumstances" may preserve to some extent the possibility for pricing selectivity in general increases, I am uncertain as to what showing would have to be made to meet this standard. Returning to the Ex Parte No. 349 decision, the majority allowed without investigation a 4-percent in-

crease on bituminous steam coal to, from, and within the South. This 4-percent level of increase was twice that applied to other traffic in that region. I am not aware of compelling circumstances nor any other appropriate basis for discriminating against coal users in the South. Rather, this reflects an instance where pricing selectivity should have been permitted pending a formal investigation into the resulting rate levels. I disagree with the majority to the extent it precludes such selectivity.

APPENDIX D

RELEVANT PROVISIONS OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976 (PUB. L. 94-210; 90 STAT. 31)

SEC. 101. (a) PURPOSE.—It is the purpose of the Congress in this Act to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through—

(1) ratemaking and regulatory reform;

(2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;

(3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;

(4) transitional continuation of service on light-density rail lines that are necessary to continued employment and community well-being throughout the United States;

(5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and

(6) necessary studies.

(b) POLICY.—It is declared to be the policy of the Congress in this Act to—

(1) balance the needs of carriers, shippers, and the public;

(2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises;

(3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets;

(4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;

(5) promote separate pricing of distinct rail and rail-related services;

(6) formulate standards and guidelines for determining adequate revenue levels for railroads; and

(7) modernize and clarify the functions of railroad rate bureaus.

SEC. 202. (a) Section 1(5) of the Interstate Commerce Act (49 U.S.C. 1(5)) is amended by inserting "(a)" immediately after "(5)" and by adding at the end thereof the following new sentence: "The provisions of this subdivision shall not apply to common carriers by railroad subject to this part."

(b) Section 1(15) of the Interstate Commerce Act (49 U.S.C. 1(5)), as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subdivisions:

"(b) Each rate for any service rendered or to be rendered in the transportation of persons or property

by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the 'proponent carrier'). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes

of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

"(c) As used in this part, the terms—

"(i) 'market dominance' refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

"(ii) 'rate' means any rate or charge for the transportation of persons or property.

"(d) Within 240 days after the date of enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules."

(c) Section 15 of the Interstate Commerce Act (49 U.S.C. 15) is amended by redesignating paragraphs (8) through (14) thereof as paragraphs (10) through (16) thereof, respectively, and by inserting therein a new paragraph (9) as follows:

"(9) Following promulgation of standards under section 1(5)(d) of this part, whenever a rate of a common carrier by railroad subject to this part is challenged as being unreasonably high, the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance, within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate applies. If the Commission finds that such a carrier does not have such market dominance, such finding shall be determinative in all additional or other proceedings under this Act concerning such rate or service, unless (a) such finding is modified or set aside by the Commission, or (b) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph shall limit the Commission's power to suspend a rate pursuant to this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increase in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies."

(d) Section 15 of the Interstate Commerce Act (49 U.S.C. 15) is amended by adding at the end thereof the following two new paragraphs:

"(17) Within 1 year after the date of enactment of this paragraph, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare

and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

"(18) In order to encourage competition, to promote increased reinvestment by railroads, and to encourage and facilitate increased non-railroad investment in the production of rail services, a carrier by railroad subject to this part may, upon its own initiative or upon the request of any shipper or receiver of freight, file separate rates for distinct rail services. Within 1 year after the date of enactment of this paragraph, the Commission shall establish, by rule, expeditious procedures for permitting publication of separate rates for distinct rail services in order to (a) encourage the pricing of such services in accordance with the carrier's cash-outlays for such services and the demand therefor, and (b) enable shippers and receivers to evaluate all transportation and related charges and alternatives."

(e) Section 15 of the Interstate Commerce Act (49 U.S.C. 15), as amended by this Act, is further amended—

(1) by adding at the end of paragraph (7) thereof the following new sentence: "This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by inserting a new paragraph (8) as follows:

"(8) (a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The

hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

"(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

"(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5)(d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)

(i) of this part, over the service to which such rate increase applies; or

"(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

"(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b) (i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

"(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

"(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

"(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

"(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365-day period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

"(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

"(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complaints; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

"(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involve to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the

decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

"(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or cosignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time."

(f) Nothing in the amendments made by this section shall be construed—

(1) to modify the application of section 2, 3, or 4 of the Interstate Commerce Act (49 U.S.C. 2, 3, or 4) in determining the lawfulness of any rate or practice;

(2) to make lawful any competitive practice which is unfair, destructive, predatory, or otherwise undermines competition which is necessary in the public interest;

(3) to affect the existing law or the authority of the Commission with respect to rate relationships between ports; or

(4) to affect the authority and responsibility of the Commission to guarantee the equalization of rates within the same port.

(g) The Secretary and the Commission shall separately study the effect of the amendments made by this section on the development of an efficient and financially stable railway system in the United States. Such studies shall include (1) an analysis of the effect of such provisions upon shippers and upon carriers in all modes of transportation, and (2) proposals for further regulatory and legislative changes, if necessary. The Commission shall gather all data relating to such studies as requested by the Secretary, and shall make such data available to the Secretary. The Secretary and the Commission shall transmit the results of their respective studies to each House of Congress within 20 months after the date of the enactment of this Act.

SEC. 205. Section 15a of the Interstate Commerce Act (49 U.S.C. 15a) is amended—

(1) by adding at the end of paragraph (2) and at the end of paragraph (3) the following new sentence: "This paragraph shall not apply to common carriers by railroad subject to this part."; and

(2) by redesignating paragraph (4) as paragraph (6), and by inserting immediately after paragraph (3) the following new paragraph:

"(4) With respect to common carriers by railroad, the Commission shall, within 24 months after the date of enactment of this paragraph, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit

or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate."

SEC. 206. Section 15 of the Interstate Commerce Act (49 U.S.C. 15), as amended by section 202 of this Act, is amended by adding at the end thereof the following new paragraph:

"(19) Notwithstanding any other provision of law, a common carrier by railroad subject to this part may file with the Commission a notice of intention to file a schedule stating a new rate, fare, charge, classification, regulation, or practice whenever the implementation of the proposed schedule would require a total capital investment of $1,000,000 or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. The filing shall be accompanied by a sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based. Any interested person may request the Commission to investigate the schedule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be proviedd to interested parties.

Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 2, 3, or 4 of this part, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carrier.".

No. 78-685

In the Supreme Court of the United States

OCTOBER TERM, 1978

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General.
RICHARD A. ALLEN,
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MARK L. EVANS,
General Counsel.
KENNETH G. CAPLAN,
Deputy Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals dismissed a petition to review a decision and order of the Interstate Commerce Commission without opinion (Pet. App. 13a). The decision and order of the Commission (Pet. App. 14a–74a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on July 25, 1975, and the petition for a writ of certiorari was filed on October 23, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether railroads may obtain judicial review of a decision by the Interstate Commerce Commission to hold down a portion of a proposed rail general revenue rate increase insofar as it applies to certain specified commodities.

STATEMENT

In September 1977 most of the Nation's railroads sought permission from the Interstate Commerce Commission to file a master tariff generally increasing their freight rates and charges by an average of five percent, subject to certain exceptions. The railroads argued that the rate increase was necessary to offset increases in the cost of operation (Pet. 3).

The Commission permitted the carriers to file the master tariff, and more than 250 parties protested the increase. Finding that the proposed increase was "necessary to prevent a further decline in the railroads' overall financial condition" (Fort Howard App. at 16a), the Commission declined to suspend the tariff under the provisions of former Section 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8).[1] The Commission started an investigation, however, of seven specific commodity groups[2] because of their high revenue/cost ratios (Fort Howard App. at 16a).

After completing the investigation, the Commission found that the railroads had failed to justify the full five-percent increase with respect to the seven investigated commodities and that the increase should be limited to three percent for five of those commodities and two percent for two of them (Pet. App. 35a–36a). The Commission ordered the railroads to cancel the tariff schedules found unlawful, to stop collecting the higher rates on the specified commodities, and to make required refunds (Pet. App. 68a). It authorized the railroads to file on short notice new tariff schedules reflecting increases no greater than those found to be justified (Pet. App. 69a).

Petitioners sought judicial review of the Commission's order with respect to the investigated commodities. The Commission moved the court of appeals to dismiss the petition on the ground that the agency's order is not reviewable. The court of appeals granted the motion to dismiss (Pet. App. 13a).

[1] The Interstate Commerce Act was recently revised, codified, and enacted as Subtitle IV of Title 49, United States Code. Act of October 17, 1978, Pub. L. No. 95–473, 92 Stat. 1337. Section 15(8) was recodified as 49 U.S.C. 10707. Section 3(a) of the recodification act, 92 Stat. 1466, provides that the restatement of prior laws "may not be construed as making a substantive change in the laws replaced." For purposes of clarity, we refer to the statutes by their former designations.

[2] Newsprint paper; sodium alkalies; industrial gases; sulphuric acid; rubber; manufactured iron or steel; and recyclables. The Commission investigated recyclables because it has a continuing responsibility under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 40 (now 49 U.S.C. 10731) (the "4R Act"), to consider the effect of general rate increases on recyclables. See Pet. App. 57a. See also *National Association of Recycling Industries, Inc.* v. *ICC*, 585 F. 2d 522 (D.C. Cir. 1978), pet. for cert. pending, No. 78–872.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Although the courts have not previously considered the issue presented in this case, the general principles governing the availability of judicial review of the Commission's order have long been established. There is a recognized distinction between review of the ordinary mechanism for seeking and obtaining increases in rail carrier rates and review of the mechanism used in this case, which is known as a "general revenue proceeding."

Under the Interstate Commerce Act, the ordinary means by which a rail carrier increases its rates is by filing a new tariff under Section 6(3) of the Act, 49 U.S.C. (1976 ed.) 6(3). The carrier must give 30 days' notice to the Commission and the public, and the tariff "shall plainly state the changes proposed to be made in the schedule then in force * * *." Thus, under the usual procedure, a carrier submits a new tariff proposing to increase, in a specified amount, the rates for handling a specified commodity or commodities between specified points. Under Section 15(8) of the Act, 49 U.S.C. (1976 ed.) 15(8), when a new tariff is filed the Commission may institute a hearing to determine the lawfulness of the new rates and may (with certain exceptions) suspend the effectiveness of the new rates for as much as 10 months. In any such hearing the burden of proof is on the carrier to establish the lawfulness of the new rates. If, at the conclusion of the

hearing, the Commission finds the rates to be unlawful, it must order the carrier to refund any amounts paid to it that were found to be unlawful. A determination by the Commission that a proposed new rate is lawful or unlawful is "final" and subject to judicial review. 28 U.S.C. 2342(5).

In contrast to the ordinary means of obtaining rate increases, the Commission and the courts have long permitted many carriers, acting jointly, to file tariffs proposing general "across-the-board increases applicable to all or nearly all of their rates" on the ground that the average, system-wide costs and revenues of all of them necessitate the general increase sought. *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289, 311 (1975) (*"SCRAP II"*). Although the Commission has the same power under Section 15(8) to investigate the lawfulness of such proposed increases, to suspend them, or both, its investigation (known as a "general revenue proceeding") focuses on the average costs and revenue needs of the carriers as a whole rather than on the circumstances of a particular carrier or the costs of transporting a particular commodity between particular points. See generally *SCRAP II, supra,* 422 U.S. at 311–314.

In view of the nature of general revenue proceedings, the courts have established several principles governing their reviewability. First, if the Commission determines that a general increase is justified on the basis of system-wide costs and revenues and permits it to go into effect, a line of decisions commencing with *Algoma Coal and Coke Co.* v. *United*

States, 11 F. Supp. 487 (E.D. Va. 1935), holds that a shipper may not seek judicial review of that determination on the ground that the increase, as applied to a particular commodity or commodities, is unjust and unreasonable. The theory of that principle is that a general revenue proceeding does not focus on the circumstances pertaining to particular commodities, carriers or routes (although it may incidentally consider them), but focuses instead on system-wide costs and revenues. A shipper that believes itself aggrieved by the increase as it applies to particular commodities, routes or carriers has an adequate remedy under Section 13(1) of the Act, 49 U.S.C. (1976 ed.) 13(1), which authorizes it to file a complaint and to require the Commission to engage in a particularized inquiry into the lawfulness of the rate as applied to particular commodities. See *SCRAP II, supra,* 422 U.S. at 314–316. Any decision by the Commission resulting from such a complaint then is subject to judicial review.

One corollary of that principle is that if the Commission denies a requested general increase, or authorizes it in a lesser amount than requested, a carrier may not seek judicial review on the ground that, apart from its justification on a system-wide basis, the requested increase was just and reasonable as applied to particular commodities or his own particular circumstances or rates. Such a carrier's recourse is to use the ordinary mechanism of the Act; *i.e.,* to file a tariff under Section 6(3) pertaining to those specific commodities and his own circumstances, and thus to trigger a particularized inquiry that may be judicially reviewed.

In this case the Commission approved the requested general five percent increase as applied to most commodities, but it approved a lesser increase as applied to seven particular commodities on the ground that the evidence indicated that, as applied to those commodities, the requested rate increases would be unreasonable and that the carriers had not submitted cost and revenue data to show otherwise (Pet. App. 33a, 36a).

The Commission' decision to "hold down" a general increase on certain commodities is not unusual.[3] And the judgment of the court of appeals that that decision is not reviewable is reasonable. The effect of the non-reviewability of the Commission's decision is simply that if carriers desire an increase with respect to those commodities, they may not use the summary procedures of a general revenue proceeding, but must use the ordinary tariff procedures of the Act. That is, they must file tariffs under Section 6(3) pertaining to those particular commodities and, in any ensuing hearing on those tariffs, must defend them with cost and revenue data pertaining specifically to the movement of those commodities. Judicial review must await the conclusion of that proceeding.

Several considerations support the reasonableness of that result. First, when carriers elect to employ a master tariff and initiate a general revenue proceeding, the Commission, although it looks primarily to system-wide costs and revenues, is not required to close its eyes to the possible or probable effects of

[3] See pages 10 and note 7, *infra.*

the requested general increase on particular commodities. This Court recognized that fact in *SCRAP II, supra,* 422 U.S. at 313–314, and petitioners do not contend otherwise. See also *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 652–654 (1978) (describing the Commission's decision to suspend new tariffs as based on a "tentative" judgment about the dividing line between reasonable and unreasonable rates). If the Commission does consider those effects, but nevertheless approves the general increase for all commodities, including those specifically considered, shippers may not seek judicial review of the consideration given to specific commodities, but must invoke the complaint procedures of Section 13(1). *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D. D.C. 1970), aff'd, 401 U.S. 967 (1971). Indeed, the carriers have consistently asserted that shippers may not seek judicial review of increases approved in general revenue proceedings on *any* basis, and thus would presumably contend that shippers could not seek review on the basis of any claim that the two and three percent increases approved in this case with respect to the seven commodities was too high.[4] It is not unreasonable to

[4] Thus, carriers have consistently contended that shippers may not obtain judicial review of a general revenue proceeding even when their claim is that the Commission erred in concluding that across-the-board costs and revenues warrant a requested general increase. See Pet. 7–8; *SCRAP II, supra,* 422 U.S. at 317 n.18. The United States and the Commission have not endorsed that extreme view; in our view a decision by the Commission that general revenue needs do or do not warrant a general rate increase in

require the same result with respect to carrier claims that those authorized increases were too low.[5]

Second, the fact that the result of the Commission's order is to authorize a general rate increase of five percent on most commodities and a two or three percent increase on seven commodities does not alter the character of the proceeding as a general revenue proceeding or change the principles governing judicial review. In fact, the carriers have frequently sought general rate increases that similarly differentiate among the increases sought for different commodities.[6] Thus, for example, the Commission's proceeding in *Increased Freight Rates, 1968* (*Ex Parte No. 259*), 332 I.C.C. 714 (1969), was a general revenue proceeding initiated by a master tariff proposing "increases that ranged generally from 3 to 10 percent, de-

a general revenue proceeding is final and reviewable, since that is the principal issue that such a proceeding addresses. (This Court has reserved that question. See *SCRAP II, supra,* 422 U.S. at 317 n.18.) But our contention that determinations concerning particular commodities in a general revenue proceeding is not reviewable by either shippers or carriers is consistent with that position. The carriers' contention here, however, is not consistent with the position they have consistently urged and to which they apparently adhere. See Pet. 7–8.

[5] Whether the carriers here are actually seeking judicial review on the ground that the authorized increases were too low is not clear. See Pet. 5 and discussion at pages 11–12, *infra.*

[6] In *SCRAP II* the Court recognized that a general revenue proceeding may be initiated by a proposed rate increase that is not uniform with respect to all of the rates charged by the carriers: "In those cases, the railroads have, in the exercise of their initiative, proposed across-the-board increases applicable to all *or nearly all* of their rates." 422 U.S. at 311 (emphasis supplied).

pending upon the commodity involved." *Atlantic City Eelectric Co.* v. *United States,* 306 F. Supp. 338 (S.D. N.Y. 1969), aff'd by an equally divided Court, 400 U.S. 73 (1970). The Commission permitted the proposed increases to go into effect, and the courts, at the carriers' urging, held that shipper claims that the rates were unreasonable as they pertained to particular commodities were not reviewable. *Atlantic City Electric Co.* v. *United States, supra; Electronic Industries Association* v. *United States, supra; Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1969), aff'd by an equally divided Court, 400 U.S. 73 (1970). If carriers, in the exercise of their rate-making initiative, can seek and obtain a general rate increase that differentiates among the rates sought for different commodities and that is not reviewable at the instance of shippers, it is reasonable to conclude that the Commission may also distinguish among commodities when it partially approves a requested general increase, that its decision to differentiate is not reviewable, and that carriers, like shippers, must institute further proceedings under the Act to obtain a reviewable decision.[7]

[7] Furthermore, petitioners are incorrect in asserting (Pet. 17–20) that the Commission's decision in this case to hold down a requested increase as to certain commodities is a departure from prior practice. For example, in *Increased Freight Rates* (*Ex Parte No. 259*), *supra*, the Commission authorized increases as to some commodities but not as to others. See also *Increased Freight Rates and Charges, 1972* (*Ex Parte No. 281*), 341 I.C.C. 290 (1972); *Increased Freight Rates, 1970 and 1971* (*Ex Patre Nos. 265, 267*), 339 I.C.C. 125, 257–258 (1971); *Increased Freight Rates,*

Third, the general revenue proceeding is a summary one often carried out on an abbreviated record. The Commission's decisions necessarily are based on less than complete information about particular commodities; it cannot bring to individual rate proposals made as part of a general revenue increase the same study that it can afford when the rate proposals are made individually in filings under Section 6(3). The Commission's decision here thus ultimately is no more than that the railroads did not carry their burden of showing, in the context of a general revenue proceeding, that the five percent increases on the seven commodities were just and reasonable. A renewed filing of individual tariffs would permit additional scrutiny and the creation of a factual record more suitable for judicial review.

2. In any event, whether the Commission's decision is subject to judicial review is a question that does not warrant this Court's review in this case.

First, petitioners have not clearly presented the issue either here or in the court of appeals. Petitioners do not appear to seek judicial review of the Commission's determination that, on the basis of the evidence before it, rate increases of more than two or three percent would be unlawful. Rather, they state (Pet. 5):

> The railroads' petition for review [in the court of appeals], as their related motion

1967 (*Ex Parte No. 256*), 332 I.C.C. 280, 344–346 (1968); *Increased Freight Rates* (*Ex Parte No. 206*), 300 I.C.C. 633, 687–691 (1957). The carriers, however, did not seek judicial review of those hold-downs in those proceedings.

papers made clear, challenged the Commission's Ex Parte 343 order on the grounds that it contained an interpretation of the new and important rate provisions of the 4–R Act which is clearly erroneous and which threatens the ability of the railroads to respond in the only way that they can to the inflationary impact of the economy, that the Commission failed adequately to explain its departure from prior norms, and that the Commission in its procedure for investigation of the selected commodity groups acted arbitrarily and deprived the railroads of due process of law.

Contrary to their assertion, petitioners have not "made clear" what determinations they are requesting the courts to review or why those determinations are appropriately reviewed in the context of a general revenue proceeding, which they have consistently maintained is not subject to review on any basis. Moreover, if petitioners are contending that, regardless of the merits of the Commission's decision to limit the requested rate increase on certain commodities and otherwise to approve it, the Commission's incidental expressions of policy must be reviewed now because they would otherwise escape review, they are incorrect.[8] Under 49 U.S.C. (1976 ed.) 13(6) a person may petition the Commission to start a rulemaking pro-

[8] Furthermore, it is difficult to see the connection between the Commission's statements concerning the 4R Act (see note 2, *supra*) and its decision. The Commission's order noted that it had for some time questioned the merits of general revenue proceedings and that the "tenor, purpose, and policies of the 4R Act ratemaking provisions necessitate a de-emphasis of the role of the general

ceeding in a rail matter. If the Commission denies the petition or fails to act within 120 days, the petitioner may bring a civil action in a court of appeals. The court may order the Commssion to start the rulemaking if it is necessary and if failure to take the requested action "will result in the continuation of practices that are not consistent with the public interest or are not in accordance with [the Act]." Here, too, the railroads have available a special administrative remedy that they have not yet invoked.[9]

Second, there is no conflict among the lower courts on the reviewability issue that the railroads appear to present. In fact, as far as we know, this is the first time the railroads have sought judicial review of a Commission order in a general revenue proceeding, and it is uncertain whether their access to the courts in such cases is likely to be an issue of recurring importance.

increase in railroad ratemaking" (Pet. App. 16a). But it went on to note that the 4R Act does not preclude general rate increases and that such increases serve one of the policies of that Act (*id.* at 18a–20a). And what it *decided* in this case was to *permit* a general increase, in the full amount requested as to most commodities, and in a lesser amount as to some commodities. Petitioners do not explain why, given that decision, review of the Commission's incidental expressions of policy is necessary or appropriate. This Court reviews judicial judgments, not administrative opinions, and review thus should wait, at a minimum, until the Commission's expressions make a difference in its holding.

[9] The Commission is giving thorough consideration to the 4R Act in other proceedings. See, *e.g.*, *National Association of Recycling Industries, Inc.* v. *ICC*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
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Assistant to the Solicitor General.
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JANUARY 1979.

U.S. GOVERNMENT PRINTING OFFICE: 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF ALLIED CHEMICAL CORPORATION *ET AL.*, FOR LEAVE TO INTERVENE AND BRIEF FOR ALLIED CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

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November 22, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF ALLIED CHEMICAL CORPORATION *ET AL.*, FOR LEAVE TO INTERVENE

Allied Chemical Corporation *et al.*,[1] move for leave to intervene in this action pursuant to Rule 35 of the Supreme Court Rules. In support thereof, Allied Chemical Corporation *et al.*, state as follows:

1. This motion is made necessary solely because the United States Court of Appeals for the District of Columbia Circuit dismissed this action below before it

[1] Allied Chemical Corporation; Canadian Industries, Ltd.; Diamond Shamrock Corporation; Dow Chemical USA; Ethyl Corporation; FMC Corporation; Hooker Chemicals & Plastics Corp.; IMC Chemical Group; Monsanto Company; Olin Corporation; Pennwalt Corporation; Shell Chemical Co.; Stauffer Chemical Company; and Vulcan Materials Company.

ruled upon the Motion For Leave To Intervene of Allied Chemical Corporation *et al.*, which had been timely filed with that Court. The dismissal of the action rendered the Motion moot, and it was denied as such.

2. The proceeding before the United States Court of Appeals for the District of Columbia Circuit was instituted by a Petition for Review of an Order of the Interstate Commerce Commission in Ex Parte No. 343, *Nationwide Increased Freight Rates and Charges, 1977*. Allied Chemical Corporation, *et al.* were parties to the Commission proceeding. The order of the Commission in the proceeding limited freight rate increases on chlorine and caustic soda to two percent rather than permitting an increase of five percent as requested by the Nation's railroads. In addition, the Commission's order required amounts already charged in excess of the allowed two percent to be refunded to the shippers of chlorine and caustic soda. Allied Chemical Corporation *et al.* are substantial shippers of chlorine and caustic soda, and, therefore, their interests were substantially affected by the action in the Court of Appeals.

3. Allied Chemical Corporation *et al.* timely filed a Motion For Leave To Intervene in the Court of Appeals action pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Section 2348 of the Judicial Code. (28 U.S.C. 2348). A copy of that Motion is attached hereto as Appendix A. In addition, Allied Chemical Corporation *et al.* filed at the same time a Memorandum In Opposition To Petitioners' Motion For Stay Pending Review, a Motion To Dismiss, and a Memorandum In Support Of The Motion To Dismiss. The Interstate Commerce Commission also filed a Motion To Dismiss.

4. Section 2348 of Title 28 of the United States Code states in relevant part:

> The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order.

5. The Court of Appeals granted the Motion To Dismiss filed by the Interstate Commerce Commission. When it did so the Motion For Leave To Intervene of Allied Chemical Corporation *et al.* was before the Court. If the Court had not granted the Motion To Dismiss there is no question that in view of 28 U.S.C. 2348, the Court would have granted the Motion For Leave To Intervene. By granting the Motion To Dismiss, however, it rendered moot the Motion For Leave To Intervene. It, therefore, denied the Motion as moot. A copy of the Court's order is attached hereto as Appendix B.

WHEREFORE, in view of the circumstances involved herein, and in view of the provisions of 28 U.S.C. 2348, Allied Chemical Corporation *et al.* move this Court for leave to intervene in this proceeding in support of respondents.

Respectfully submitted,

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November 22, 1978

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA, *Respondents.*

Motion For Leave To Intervene Of:

ALLIED CHEMICAL CORPORATION
BASF WYANDOTTE CORPORATION
CANADIAN INDUSTRIES, LTD.
DIAMOND SHAMROCK CORPORATION
DOW CHEMICAL USA
ETHYL CORPORATION
FMC CORPORATION
HOOKER CHEMICALS & PLASTICS CORP.
IMC CHEMICAL GROUP
MONSANTO COMPANY
OLIN CORPORATION
PENNWALT CORPORATION
PPG INDUSTRIES, INC.
SHELL CHEMICAL COMPANY
STAUFFER CHEMICAL COMPANY
VULCAN MATERIALS COMPANY

The above-captioned companies move for leave to intervene in this action pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Section 2348 of the Judicial Code. (28 U.S.C. 2348) In support thereof, the above-captioned companies state as follows:

1. This proceeding was instituted by a Petition for Review of an Order of the Interstate Commerce Commission served June 29, 1978, in Ex Parte No. 343, *Nationwide Increased Freight Rates and Charges, 1977.*

2. The above-captioned companies were parties to the above proceeding which the Petitioners seek to have reviewed in this proceeding. The order of the Commission here on review limits freight rate increases on chlorine and caustic soda to two percent rather than permitting an increase of five percent requested by Petitioners to remain in effect. In addition, the Commission's Order requires amounts charged in excess of the allowed two percent increase to be refunded to shippers of chlorine and caustic soda. The above-captioned chemical companies are substantial shippers of chlorine and caustic soda, and, accordingly, their interests are substantially affected by this proceeding.

3. Section 2348 of Title 28 of the United States Code permits intervention in review proceedings by persons party to the action before the Interstate Commerce Commission whose interests will be affected by the outcome of the review.

WHEREFORE, Allied Chemical Corporation, BASF Wyandotte Corporation, Canadian Industries, Ltd., Diamond Shamrock Corporation, Dow Chemical USA, Ethyl Corporation, FMC Corporation, Hooker Chemicals & Plastics Corp., IMC Chemical Group, Monsanto Company, Olin Corporation, Pennwalt Corporation, PPG Industries, Inc., Shell Chemical Co., Stauffer Chemical Company, Vulcan Materials Company, respectfully move this Court for leave to intetrvene in this proceeding in support of respondent.

Respectfully submitted,

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July 21, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

Filed July 27, 1978

Order

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,
2. The Fort Howard Paper Company of Green Bay, Wisconsin
3. Allied Chemical Corporation, et al.,
4. PPG Industries, Inc.,

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that aforesaid motions for leave to intervene are denied as moot.

GEORGE A. FISHER, CLERK
FOR THE COURT

/s/ DANIEL M. CATHEY
Daniel M. Cathey
First Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR ALLIED CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission issued in a general revenue proceeding reviewable insofar as that order allows or disallows a portion of the general revenue increase as it applies on certain specific commodities?

STATEMENT OF THE CASE

On September 26, 1977, the Nation's railroads petitioned the Interstate Commerce Commission for authority to file a general revenue increase of five percent. In an order served September 29, 1977, the Commission authorized the filing of such a general increase tariff subject to protest and possible suspension and/or investigation. In addition, the Commission required that the increase tariff contain a refund provision in the event that some or all of the general increase was ultimately found to be unreasonable.

Following the submission of shipper protests and railroad replies thereto, and after oral argument, the Commission, on November 10, 1977, issued an order allowing the five percent increase to go into effect subject to certain exceptions. The Commission ordered that the increase on feed grains from Midwestern origins to New England points should be no greater than three percent, and ordered no increase on certain wood chip rates. In addition, the Commission ordered an investigation into the lawfulness of the general increase on seven specified commodity groups. The investigation into the lawfulness of the rate increase on the seven commodity groups was based upon the Commission's analysis of the ratios of revenues to variable costs on those commodity groups. The Commission analysis indicated that those commodity groups were already bearing extremely high railroad freight rates.

Pursuant to the Commission's procedural schedule the railroads and shippers, including Allied Chemical Corporation, *et al.*, submitted substantial testimony bearing upon the lawfulness of the increases. On June 29, 1978, the Commission issued its decision and order in which it found that the railroads had failed to justify

the full five percent increase on commodities under investigation. The Commission held as to the commodities under investigation:

> The majority of the commodities will receive 3 percent with the exception of sodium alkalies, industrial gases, and recyclables. This increase will grant relief to shippers by limiting the increase on these commodities which are already subject to high rate/cost ratios. It should be noted that the proposed 5-percent increase, if authorized, would result in a disproportionate contribution by these commodities, a result not justified by the evidence in this proceeding.
>
> * * * *
>
> In the case of sodium alkalies and industrial gases, shippers have provided persuasive evidence to warrant limiting the increase on these commodities to 2 percent. (Commission Order of June 29, 1978, p. 21, Petitioners App. A, p. 36a)

On July 10, 1978, the railroads filed a petition for review, and a motion for stay of the Commission's order in the United States Court of Appeals. The Commission, Allied Chemical Corporation, *et al.* and other shippers filed motions to dismiss and opposed the issuance of a stay order. On July 25, 1978, the Court of Appeals granted the Commission's motion to dismiss.

ARGUMENT

A. The Commission's Long-Standing Practice Of Granting Or Refusing To Grant Increases On Specific Commodities In General Revenue Proceedings Has Consistently Been Held Non-Reviewable By The Federal Courts.

The Petition For A Writ Of Certiorari alleges that the decision of the Commission constitutes a substantial departure from past Commission practice, and creates novel issues of law. Such contention has no

merit. The Commission has long considered the lawfulness of general rate increases insofar as they apply to specific commodities, and the courts have consistently refused to review the Commission's conclusions and orders in this regard. The instant case is but another in a long line of cases, and presents no conflict among the circuits and no conflict with decisions of this Court.

In Ex Parte No. 103, *Fifteen Per Cent Case, 1931,* 178 I.C.C. 539 (1931) the Nation's railroads claimed that an emergency situation existed, and requested authority to make a general rate increase of 15 percent on all commodities. In its decision, the Commission held:

> It is similarly our conclusion that such an increase would raise the rates upon many kinds of traffic above a just and reasonable level. This latter conclusion applies particularly to the products of agriculture, including livestock. (178 I.C.C. 577)

The Commission went on to disallow any increase on numerous agricultural commodities. (178 I.C.C. 587)

In Ex Parte No. 115, *Emergency Freight Charges, 1935,* 208 I.C.C. 4 (1935) the Nation's railroads sought a general increase in freight rates. Shippers of numerous commodities, most notably coal, requested that the Commission suspend the increases on their specific commodities. The Commission declined to suspend the increases and certain coal shippers appealed. In the leading case of *Algoma Coal & Coke* v. *United States,* 11 F.Supp. 487 (E.D. Va. 1935) a three-judge district court held that shippers cannot sue with "[t]he object * * * to enjoin putting [particular] increased rates into effect," 11 F.Supp. at 491, but rather must exhaust the statutory procedures for contesting the reasonableness of particular rates even though they have been raised

as a result of a Commission-authorized general rate increase.

In Ex Parte No. 175, *Increased Freight Rates, 1951,* 297 I.C.C. 17 (1955) the Commission held, after a long investigation, that certain general increases as they applied on coal were reasonable. Certain coal shippers appealed, and in *Koppers Company* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955) a three-judge court again held that the Commission's order was non-reviewable.

In *Proposed Increased Refrigeration Charges,* 297 I.C.C. 505 (1956) the railroads asked for general increases in refrigeration charges. Shippers objected, a hearing was held, the increases were permitted, and shippers appealed. Once again in *Florida Citrus Comm'n* v. *United States,* 144 F.Supp. 517 (N.D. Fla. 1956); aff'd *per curiam,* 352 U.S. 1021 (1957) a three-judge district court held that the Commission's order was non-reviewable and this Court affirmed.

In Ex Parte No. 206, *Increased Freight Rates, Eastern, Western and Southern Territories, 1956,* 300 I.C.C. 633 (1957) the Commission authorized general rate increases, but ordered hold-downs on several commodity groups. (300 I.C.C. 687-691) In Ex Parte No. 259, *Increased Freight Rates, 1968,* 332 I.C.C. 714 (1969) the Commission authorized general rate increases but ordered an investigation into the lawfulness of the proposed increases as they applied to specific commodities. The proceeding was structured in virtually the same fashion as the instant case. Following investigation, the Commission concluded that the increases were lawful on some commodities and unlawful on others. For example, the Commission concluded that rates on potash should not be increased the full amount re-

quested, but that rates on household and electrical appliances should bear the full increase requested.

In *Electronic Industries Ass'n* v. *United States,* 310 F.Supp. 1286 (D.D.C. 1970) aff'd mem. 401 U.S. 967 (1971) shippers of electronic appliances appealed the Commission decision in Ex Parte No. 259 allowing the full increase on two commodities. The shippers attempted to distinguish their case from *Algoma Coal & Coke, supra,* on the ground that in *Algoma* the Commission had declined to suspend or investigate the rate increases whereas in Ex Parte No. 259, the Commission had investigated the lawfulness of the general increases on their specific commodities. The Commission and the railroads filed motions to dismiss, and the three-judge district court granted the motions. This Court affirmed.

This case is in no way distinguishable from the *Electronic Industries* case. The railroads here seek a rule that if the Commission investigates a general rate increase as it applies to specific commodities and finds that the increase is lawful as to those commodities, the order is non-reviewable. They contend, on the other hand, that if the Commission finds the rates unlawful as to those commodities, the order is reviewable. Stated differently, if in the Ex Parte No. 259 case, the railroads had challenged the Commission hold-down on potash, the matter would be reviewable, but the challenged refusal to hold-down electronic appliances is not reviewable.

There is no question that Allied Chemical Corporation *et al.* could not have had the order of the Commission here in issue reviewed. Under *Electronic Industries, supra,* and *Council of Forest Industries of British Columbia* v. *I.C.C.,* 570 F2d 1056 (C.A.D.C. 1978) any attempt to appeal the Commission order granting

the two percent increase on industrial gases and sodium alkalies, would have been met, as shippers in the past have been met, with a successful motion to dismiss. Any rule permitting one side of a controversy to appeal while the other side may not, would be inequitable and illogical in the extreme.

B. The Nation's Railroads Have Failed To Exhaust Their Statutory And Administrative Remedies.

The only distinction between this case and cases like *Electronic Industries, supra,* and *Council of Forest Industries, supra,* is that the railroads rather than the shippers are seeking review. This, however, is a distinction without a difference.

The Nation's railroads are free, collectively or individually or in rate-making groups, to propose changes in rail rates on any commodity or commodity groups, between any origin and any destination. The Commission may review the lawfulness of such proposed changes on its own motion or upon complaint by interested parties. Any shipper seeking a change in an existing rate must file a complaint with the Commission, and be prepared to carry the burden of proving that the existing rate is unlawful. A railroad or group of railroads need only file the rate change with the Commission.[1]

As previously noted, *Electronic Industries, supra,* and similar cases are bottomed upon the proposition that the complaining shippers had failed to exhaust

[1] As will be discussed below, the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210; 90 Stat. 31) have substantially increased the railroads' power to change individual rates.

their administrative remedies. In the present situation, the railroads have failed to exhaust their remedies. They need only file an increase on any rate or rates which they believe to be too low. To require shippers to file an administrative complaint before seeking judicial review while permitting railroads to obtain judicial review without even requiring them to change rates over which they have control would be unconscionable.

The railroad contention that the action of the Commission with respect to the commodity groups in issue is administratively final is incorrect. The Commission found that the railroads had failed to justify the proposed increases on these commodities, but it certainly did not foreclose the filing of individual rate adjustments nor did it decide the merits of any individual rate adjustment, or individual rate adjustment proceeding. This case is no more final than was the Commission decision in *Electronic Industries, supra.*

C. The Commission's Decision Herein Is In No Way Dependent Upon Its Discussion Of The "4-R Act."

The railroads contend that this proceeding involves questions of the first impression relating to proper interpretation of the ratemaking provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, (Pub. L. 94-210; 90 Stat. 31). This contention lacks merit.

The Commission's discussion of the "4-R Act" provisions and purposes clearly indicates that it does not interpret the Act as prohibiting general rate increases, nor does the Commission conclude that the Act changes the railroad burden of proof in general increase proceedings. The Commission does observe that the "4-R Act" gives the railroads far more flexibility and freedom in establishing individual rates.

The conclusions of the Commission with respect to the specific commodity hold-downs ordered are in no way dependent upon any interpretation of the "4-R Act." The conclusions are based upon shipper evidence, or lack of railroad evidence with respect to those commodities in precisely the same manner as the Commission's decision a half century ago in the *Fifteen Per Cent Case, supra.* In its conclusions herein with respect to the specific commodities under investigation, the Commission held:

> We find that while respondents have generally justified the 5-percent increase based on their overall revenue need * * * they have failed to establish that the increase on the commodities under investigation are justified on the basis of the cost of providing the services in issue. This investigation was precipitated by the high rate/cost ratios exhibited by these commodities. In the context of this proceeding cost evidence is important in determining whether the increases on these commodities are just and reasonable. (Petition For Writ Of Certiorari, App. B, P. 35a)

The Commission went on to hold:

> We must reiterate that respondents' failure to discuss the relevant factors affecting the rate levels of these commodities in the context of the cost of providing the service was a fatal error in this proceeding, given the initial reason for investigating these commodities. (Petition For Writ Of Certiorari, App. B, p. 36a)

The Commission's decision was not based upon the "4-R Act," but, rather, followed well-established Commission precedent. The discussion of the "4-R Act" provisions simply points out that the remedy of the railroads to increase individual rates is now greater than it was before the "4-R Act" was enacted by Congress. Stated differently, since the railroads have the ability to change any rate on any commodity that they feel is too low, and since the "4-R Act" clearly increases that ability, the railroads have no more right to judicial review of general increase orders as they apply to specific commodities than do shippers.

If the Commission's decision had said exactly the same things with respect to the "4-R Act," it still could have held on the basis of evidence presented that the five percent increase was justified. If that had occurred, the railroads would not have filed this action, and the shippers would have been precluded by *Electronic Industries, supra,* and similar cases from obtaining review. It is the result, based upon evidence that the railroads don't like, not the dictum regarding the "4-R Act," and it is the result based upon evidence that the railroads seek to have reviewed. Viewed in the light most favorable to the railroads, a decision by this Court finding that the Commission's statements with respect to the "4-R Act" are totally in error would not have the effect of reversing the Commission decision which is based entirely upon the evidence of record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Washington, D.C. 20005

Attorneys for Intervenors

November 22, 1978

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION OF PPG INDUSTRIES, INC. FOR LEAVE TO INTERVENE AND BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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November 21, 1978

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERROBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
(412) 881-7483

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IN THE

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October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

MOTION OF PPG INDUSTRIES, INC. FOR LEAVE TO INTERVENE

AND NOW, PPG Industries, Inc. (PPG), by its attorneys, Wick, Vuono & Lavelle, 2310 Grant Building, Pittsburgh, Pennsylvania 15219, respectfully moves this Court for leave to intervene in support of Respondents in the above-captioned proceeding, and in support thereof states as follows:

1. This proceeding was instituted by a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (Petition), dated October 23, 1978.

2. The Petition requests the review of the July 25, 1978 Order of the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) at No. 78-1636 dismissing the Petitioners' Petition for Review of an order entered by the Interstate Commerce Commission in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977,* served June 29, 1978. The Petitioners also filed a Motion for Stay Pending Review with the Court of Appeals in the same proceeding.

3. The proceeding before the Commission was instituted by the United States railroads for the purpose of securing approval of a general increase in freight rates and charges. PPG, with its offices located at One Gateway Center, Pittsburgh, Pa. 15222, protested the application of the general increase to the commodities of chlorine and caustic soda, and was an active participant in the proceeding before the Commission. PPG is a substantial shipper of chlorine and caustic soda, and, accordingly, its interests were substantially affected by the Commission proceeding.

4. PPG, as a party in interest to the proceeding before the Commission, filed a Motion for Leave to Intervene in support of Respondents in the proceeding before the Court of Appeals at No. 78-1636, pursuant to the provisions of 28 U.S.C. § 2348, which permits a party in interest to intervene as of right in the review of a Commission's order by a court of appeals.

5. The Court of Appeals, by order dated July 25, 1978, dismissed the Petitioners' Petition for Review at No. 78-1636, based on a Motion to Dismiss filed by the Respondents. The Court of Appeals also dismissed Petitioners' Motion for Stay Pending Review as moot. The said order is attached to Petitioners' Petition as Appendix B.

6. PPG, and other shippers, also filed motions to dismiss the Petition for Review and answers to the Motion for Stay Pending Review. The Court of Appeals, by order dated July 27, 1978, dismissed the motions and answers filed by PPG and other shippers as moot. A copy of said order is attached hereto as Appendix A.

7. PPG now requests leave to intervene in this proceeding and permission to file the attached Brief in Opposition for Writ of Certiorari. PPG would already be a party to the proceeding before this Court, pursuant to the provisions of 28 U.S.C. § 2348, except that the Court of Appeals had already dismissed Petitioners' Petition for Review prior to considering PPG's Motion for Leave to Intervene.

8. Intervention by PPG will not broaden the issues in this proceeding or cause prejudice to the Petitioners.

WHEREFORE, PPG Industries, Inc., respectfully requests that it be permitted to intervene in the above-captioned proceeding in support of Respondents, and upon intervention, be permitted to file the attached Brief in Opposition for Writ of Certiorari.

Respectfully submitted,

HENRY M. WICK, JR.,
CHARLES J. STREIFF,
WICK, VUONO & LAVELLE,
2310 Grant Building,
Pittsburgh, Pa. 15219,
Attorneys for Intervenor
PPG Industries, Inc.

Dated: November 21, 1978.

APPENDIX A

Order of the United States Court of Appeals for the District of Columbia Circuit Dated July 27, 1978

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 78-1636 September Term, 1977

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,

2. The Fort Howard Paper Company of Green Bay, Wisconsin

3. Allied Chemical Corporation, *et al.*,

4. PPG Industries, Inc.,

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that the aforesaid motions for leave to intervene are denied as moot.

FOR THE COURT:
GEORGE A. FISHER, CLERK,
BY: DANIEL M. CATHEY,
Daniel M. Cathey,
First Deputy Clerk.

United States Court of Appeals
for the District of Columbia Circuit
Filed Jul 27 1978
George A. Fisher
Clerk

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Intervenor-Respondent, PPG Industries, Inc., prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the Petitioner railroads, requesting the review of the order of the United States Court of Appeals for the District of Columbia

Circuit entered on July 25, 1978 in the proceedings styled *Aberdeen and Rockfish Railroad Company v. Interstate Commerce Commission and United States of America,* No. 78-1636, be denied in its entirety.

Decision Below

A panel of the United States Court of Appeals for the District of Columbia granted without opinion a motion to dismiss a petition for review of the Decision and Order of the Interstate Commerce Commission (the Commission) served June 29, 1978 in proceedings styled *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977.* The order of the Court of Appeals dismissing the petition for review is attached to the Petition as Appendix B and the Decision and Order of the Commission as Appendix C.

Jurisdiction

The jurisdictional requisities are adequately set forth in the Petition.

Question Presented

Whether the Court of Appeals erred in granting a motion to dismiss a petition for review of an order of the Interstate Commerce Commission in which the Commission found that the evidence submitted by the Petitioners did not fully justify the grant of a five percent general rate increase on seven specific commodity groups?

Statutes Involved

The pertinent provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210; 90 Stat. 31) are set forth in the Petition as Appendix D.

Statement of the Case

On September 26, 1977 the Petitioners petitioned the Commission for authorization to increase their freight rates from, to and within all territories by five percent, effective November 30, 1977, allegedly in order to offset increases in the cost of labor, materials and supplies. The Commission, by order served on September 29, 1977, authorized the filing and publication of a tariff of increased rates with appropriate refund provisions, to become effective no earlier than November 30, 1977, subject to protest and possible suspension. The Commission also provided for the filing of protests and replies thereto.

After consideration of protests, replies and oral argument, the Commission, by order served on November 10, 1977, refused to suspend the five percent general rate increase requested by the Petitioners. However, the Commission did institute an investigation into the lawfulness of the increase as it applied to the following commodities: (1) newsprint paper, (2) sodium alkalies, (3) industrial gases, (4) sulphuric acid, (5) rubber (natural or synthetic), (6) manufactured iron or steel, and (7) recycables. The Commission also directed all parties to submit briefs on the question of the interrelationship of the special rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) and railroad general rate increase proceedings.

Intervenor-Respondent, PPG Industries, Inc. (PPG), is a substantial supplier of chlorine (industrial gas) and caustic soda (sodium alkali), producing and shipping these commodities by rail from plants located in Louisiana, Ohio and West Virginia. PPG took an active part in the proceeding before the Commission and on February 13, 1978 submitted substantial evidence, in the form of verified statements and

argument, which demonstrated that the Petitioners' pricing practices on chlorine and caustic soda have resulted in excessive rates and earnings for the railroads. Similar evidence concerning chlorine and caustic soda was submitted by other protestant shippers.

On June 29, 1978, the Commission concluded its investigation of the lawfulness of the five percent increase as applied to the seven specified commodity groups and its consideration of the interrelationship of the rate provisions of the 4-R Act and general rate increase proceedings. By Decision and Order served on that date, the Commission granted the Petitioners authority to establish increases in the rates on the seven specified commodities from two to three percent and directed them to make appropriate refunds in view of the five percent increase which it had allowed to go into effect. Specifically in regard to chlorine and caustic soda, the Commission permitted an increase of two percent based on the protestant shippers' cost evidence, which demonstrated that any additional increases were not supported by the record.

On July 10, 1978, Petitioners filed in the Court of Appeals their petition for review of the Commission's June 29, 1978 Decision and Order, together with a motion for stay pending review. The Commission and certain shipper groups, including PPG, opposed the motion for stay pending review and, in addition, filed motions to dismiss the petition for review. PPG and the other shipper groups also filed motions for leave to intervene with the Court of Appeals in support of Respondents pursuant to the provisions of the Judicial Code (28 U.S.C. § 2348), which permits a party in interest to a proceeding before the Commission to appear as of right in the review of the subject proceeding by a court of appeals.

On July 25, 1978, the Court of Appeals granted the Respondents' motion to dismiss the petition for review. Subsequently, on July 27, 1978, the Court of Appeals dismissed the motions for leave to intervene filed by the shipper groups as moot. The Court of Appeals July 27, 1978 order is set forth in Appendix A to Intervenor-Respondent PPG's concurrently filed motion for leave to intervene with this Court.

Reasons for Denying this Writ

The Court of Appeals committed no error in granting Respondents' motion to dismiss Petitioners' petition for review. Respondents' motion to dismiss was predicated on the holding in *Council of Forest Industries of British Columbia v. I.C.C.*, 570 F.2d 1056 (D. C. Cir. 1978), and supported by a long line of precedents, that judicial review of a Commission order in a general rate increase proceeding is not available to shippers which challenge the effect of such an order on specific commodities; those shippers must first exhaust the remedies available to them under Sections 13 and 15 of the Interstate Commerce Act (the Act). These cases have direct application to the Petitioners' petition for review of the Commission's June 29, 1978 Decision and Order.

The Petitioners also raise additional arguments concerning the application of the 4-R Act to general rate increase proceedings and the alleged denial of due process of law. Although these issues will be discussed, they should be disregarded since the only issue to be decided is whether the Court of Appeals has jurisdiction over the proceeding in controversey. As is apparent from the Court of Appeals' July 25, 1978 Order, it dismissed Petitioners' petition for review on the basis of lack of jurisdiction, and, as a result, this is the only issue properly before this Court.

ARGUMENT

I.

Petitioners have no right of review of general rate increase orders as they apply to specific commodities.

The Court of Appeals, in dismissing the petition for review, stated that the dismissal was based on a consideration of Respondents' motion to dismiss. Respondents' motion to dismiss rested on the Court of Appeals decision in *Council of Forest Industries of British Columbia v. I.C.C.*, 570 F.2d 1056 (D.C. Cir. 1978), where it was held that review of a Commission order in a general increase proceeding is not available to shippers which challenge the effect of such an order on specific commodities. The Court of Appeals stated that it was "settled" law that challenges of such narrow scope must be brought in complaint proceedings under Sections 13 and 15 of the Act, citing *Electronics Industries Ass'n v. United States*, 310 F.Supp. 1286 (three judge court) (D. C. Cir. 1970), *aff'd* 401 U.S. 967 (1971).

The Court of Appeals decision in *Electronics Industries* was based on the doctrine initially stated in *Algoma Coal & Coke Co. v. United States*, 11 F.Supp. 487 (three judge court) (E.D. Va. 1935), that a Commission order in a general rate increase case leaves questions concerning particular rates to be determined in later Commission proceedings, and, therefore, appropriate administrative remedies have not been exhausted. This doctrine has been consistently upheld by reviewing courts. *See, e.g., Asphalt Roofing Mfg. Assoc. v. I.C.C.*, 567 F.2d 994 (D.C. Cir. 1977); *Florida Citrus Comm'n v. United States*, 144 F.Supp. 517 (three judge court) (N.D. Fla. 1956), *aff'd mem.* 352 U.S. 1021 (1957); *Koppers Company v. United States*, 132 F.Supp. 159 (three judge court) (W.D. Pa. 1955).

In *Council of Forest Industries*, this doctrine was upheld despite the claim that the Commission's action constituted broad territorial discrimination against a significant section of an entire industry. In rejecting this claim as a basis for review, the Court of Appeals held that: (1) a general proceeding was not necessary to grant relief desired, and (2) the Commission's action was not a final determination of Petitioners' claims. 570 F.2d at 1064. These holdings are controlling in the instant case, and require the denial of Petitioners' Petition.

Petitioners contend that the Commission's action in this case was comparable to a Section 13(1) or 15(1) proceeding, was a "final" order and that no other proceeding is available for the Petitioners to present these issues. Petitioners seek a "limited" rule that, where the Commission, in a general revenue increase proceeding, ". . .conducts an investigation with respect to rates for specific commodities and makes a determination with respect to the lawfulness of such rates, its orders shall be reviewable to that extent." (Petition, page 9).

Petitioners are in error. The Commission in this proceeding did institute an investigation into the lawfulness of the five percent increase on certain commodity groups, stating that the issue to be resolved was ". . .[w]hether the 5-percent increase on the commodity groups under investigation is just and reasonable." (Appendix C to Petition, page 31a). However, the Commission did not undertake to consider the lawfulness of specific rates on the involved commodities from specific origins to specific destinations, as it would in a Section 13(1) or 15(1) complaint proceeding or an investigation and suspension proceeding. Nor did it issue an order setting a maximum reasonable rate level under Section 1(5) of the Act.

The Commission did find that the Petitioners had not fully justified the proposed five percent cost increase, and that a

lesser increase was justified due to the Petitioners' overall revenue needs. As to sodium alkalies and industrial gases, the Commission found that the

> . . .shippers have provided persuasive evidence to warrant limiting the increase on these commodities to 2 percent. (Appendix C to Petition, p. 36a).

In its specific findings as to sodium alkalies and industrial gases, the Commission further stated that

> [b]ased on the evidence submitted we find that the railroads have failed to show that the 5-percent increase on these commodities is just and reasonable. (Appendix C to Petition, p. 48a).

These are not "final" orders as to the maximum reasonable level of any specific rate; rather these are findings that the Petitioners did not meet their burden of proof imposed by Section 15 of the Act to show that the proposed across-the-board percentage increases were just and reasonable. These findings do not prevent the Petitioners from litigating the lawfulness of individual rate increases on these commodities. The Petitioners can file tariffs at any time increasing rates on any commodity if they believe such increases can be justified, and shippers must then meet a heavy burden to secure suspension of such increases. In fact, this Court may take judicial notice of the fact that the Petitioners have requested the Commission to grant two additional general rate increases since the Commission's consideration of this proceeding: *Ex Parte No. 349, Increased Freight Rates and Charges, 1978, Nationwide*—4 percent general rate increase on various commodities except for a 2 percent increase from, to and within Southern Territory; *Ex Parte No. 357, Increased Freight Rates and Charges Nationwide—8 Percent*—8 percent general rate increase on various commodities, with certain exceptions. In any event, if the rate increase is suspended, there is an ex-

pedited procedure prescribed in Section 15(8) (a) of the Act to secure a final decision from the Commission on the lawfulness of the specific rate in issue.

In short, the Petitioners are in error in stating that they are faced with a final order on the lawfulness of rates on specific traffic. The Commission's June 29, 1978 Decision and Order did not prescribe maximum reasonable rates and the Petitioners are free to take appropriate action to file specific rates and seek a final order on the lawfulness of specific rates. As the Court of Appeals stated in *Council of Forest Industries of British Columbia,* "[a] general proceeding is not necessary to resolve these arguments [of Petitioners] or grant the relief they require." 570 F.2d at 1064. Consistent with this holding, this Court should deny Petitioners' Petition.

II.

The Commission's review of particular commodities in a general rate increase case was not a change from past practice and was not in violation of the provisions of the 4-R Act.

The Petitioners contend that the Commission's procedure in this proceeding of reviewing particular commodities in a general rate increase case represents a departure from past practice, and was an attempt by the Commission to shift the burden of proof to the railroads. These contentions are erroneous.

As early as 1931, the Commission concluded in *Fifteen Percent Case, 1931,* 178 I.C.C. 539, 577 (1931), that it would not permit a general revenue increase in the amount sought by the railroads, because the increase would raise the level of rates above a reasonable level, particularly on agriculture products. The railroads were directed to consider both in-

creases and decreases, on specific traffic, as a preferable method of securing revenue. Further, a review of recent general rate increase proceedings shows that the Commission has investigated particular commodities, based on evidence adduced from both the railroads and the protesting shippers. For example, in *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 290 (1972), the Commission found that the railroads had not justified the proposed rate increase on woodpulp traffic moving within Official Territory and, therefore, did not permit an increase in rates as to that commodity. 341 I.C.C. at 493-97. In the same proceeding, the Commission also granted selective partial increased rates on certain commodities (*e.g.,* the proposed six percent increase on fluorocarbons was cut back to four percent). *Id.* at 416-18.

An even more striking example of the Commission's exercise of selective rate application is found in *Increased Freight Rates, 1968,* 332 I.C.C. 714 (1969). In that case the railroads proposed increases varying from three to ten percent. The Commission, in its decision, was selective and permitted some flat increases, scaled down certain proposed rates, and applied increases to other commodity groups. And, in *Increased Freight Rates and Charges, 1973, Nationwide,* 344 I.C.C. 589 (1973), the Commission approved a three percent general rate increase, despite the fact a five percent increase had been proposed by the railroads. The Commission also specifically commented that, as to coal, protestant shippers had presented extensive cost evidence of coal traffic profitability, but that the railroads had elected not to supply expense and revenue data. The Commission held that in ". . .[t]he absence of a more detailed showing by respondents, we cannot approve a higher increase on coal in the East than on traffic generally." 344 I.C.C. at 653. Thus, the Commission gave effect to cost evidence in requiring a holddown to three percent.

The Petitioners further contend that the Commission erred in finding that the 4-R Act permits the investigation of particular commodities in a general rate increase proceeding. In this regard, the Commission stated that

> [t]his decision does not foreclose general rate increases. It does establish a Commission policy which will de-emphasize the general increase. These powers include an ability to impose holddowns where necessary in a general increase proceeding....(Appendix C to Petition, page 30a).

As noted above, the Commission has, for a number of years and prior to the enactment of the 4-R Act, investigated particular commodities in general rate increase proceedings. Moreover, the 4-R Act does not contain any language depriving the Commission of its power or discretion to consider the reasonableness of an increase in rates on commodity groups in a general rate increase proceeding. Petitioners cite no language which supports a conclusion that the Commission's power in general rate increase proceedings has been diminished.

In summary, Petitioners' contention that the Commission has departed from "prior norms" is without merit. The Commission fully explained its reasons for the decision. Moreover, the Commission was properly continuing the exercise of its discretionary powers to review the justification of general rate increases on recognized commodity groups.

In essence, the Petitioners argue that the 4-R Act requires that the Commission only direct its review to the general revenue needs of the railroads, and that the Commission may make no other determinations in a general rate increase proceeding. This was not the law prior to the 4-R Act, and the enactment of the 4-R Act has not altered the Commissions's discretionary power to review the lawfulness of rates on particular commodities in a general rate increase proceeding.

III.

The Commission did not act arbitrarily in selecting certain commodities for investigation.

The Petitioners contend that the Commission's selection of particular commodities for investigation was arbitrary and without rational basis. However, the investigation was based on studies available to the Commission indicating that the seven commodity groups to be investigated were bearing a disproportionate share of Petitioners revenue needs, and the Commission's June 29, 1978 Decision and Order fully explained the Commission's use of the rate/cost ratios and how the particular commodities were selected.

> The railroads contend that selection of the commodities for investigation on the basis of rate/cost ratios is an arbitrary standard and will be utilized by the Commission as the sole criterion for judging the reasonableness of the rates under investigation. Most of their argument and supporting evidence is predicated on this basic premise. Certain parties characterize respondents' contention as a "strawman" argument designed to obscure the real issue before the Commission. Suffice it to say, that use of rate/cost ratios for the purpose of delineating areas in need of investigation is not indicative of an intent on the part of the Commission to transform this pre-investigatory tool into an arbitrary standard for the determination of reasonableness of rates. It is well settled that the scope of an investigation proceeding is within the discretion of the Commission. The rate/cost ratio is an appropriate tool for use by the Commission in determining what should be investigated. This does not imply any prejudgment of the lawfulness of the investigated rates on our part....(Appendix C to Petition, pages 31a-32a).

In regard to the Commission's use of the 1975 waybill sample, the Commission stated that

> While cost evidence is not the exclusive test of reasonableness it at least provides a standard by which to measure the extent to which the rate level deviates from the cost of providing the services and so is helpful in keeping this margin within reasonable bounds. Respondents have failed to set forth any relevant cost evidence (with the exception of newsprint. . .) to aid in evaluating the increases on the commodities in question. The railroads have argued vigorously against use of the rate/cost ratios contained in the Section 202 Study. They question the credibility of the study (footnote omitted) and yet they have supplied no competent cost evidence to take its place. In short, respondents have left us with no alternative by which to estimate the costs involved in transporting these commodities. It would appear they advocate that the Commission make a determination by evaluating the other factors which determine reasonableness, in a vacuum....(Appendix C to Petition, pages 33a-34a).

Clearly, the Commission's selection of certain specific commodity rates for investigation was not arbitrary and had a rational basis.

IV.

The Commission's investigation procedure was not a denial of the Petitioners' due process of law.

Petitioners contend that the Commission denied them two important procedural safeguards they have always been afforded in the case of challenges to individual commodity rates. First, Petitioners argue that the Commission, by instituting an investigation of specific commodity rates in a general rate increase proceeding, improperly shifted the burden of proof to the railroads. This argument is without merit in light of prior precedents in which the Commission, in general rate increase cases, has directed the railroads to consider both increases and decreases, in specific traffic, as a preferable method of securing revenue. *Fifteen Percent Case, 1931*, 178 I.C.C. 539, 577 (1931).

Secondly, the Petitioners argue that they were not accorded full opportunity and adequate time to prepare their evidence, particularly cost data, demonstrating that rates on the seven selected commodity groups were just and reasonable. The Petitioners voluntarily elected not to submit cost data, either in their original justification filed September 26, 1977 or in their response to the evidence submitted by PPG and other parties. The Petitioners limited their response to attacks upon the validity of the evidence submitted by the protestants, and now claim that they were granted insufficient time by the Commission to prepare a complete justification on the involved commodities. However, the initial order in the proceeding, served November 30, 1977, placed the Petitioners on notice that the further investigation of the particular commodities would rely upon cost evidence. It is difficult to imagine that the Petitioners, with their vast resources and numerous qualified technicians, could not have provided the necessary cost data within the time required by the Commission. Protestants did supply cost evidence within the equivalent time alloted to them. In light of these facts, the Petitioners' claim of lack of due process and violation of the provisions of the Administrative Procedure Act (5 U.S.C. § 556(d)) by the Commission should be disregarded.

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CHARLES J. STREIFF,
WICK, VUONO & LAVELLE,
2310 Grant Building,
Pittsburgh, Pa. 15219,
Attorneys for Intervenor
PPG INDUSTRIES, INC.

Dated: November 21, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

MOTION OF FORT HOWARD PAPER COMPANY TO INTERVENE AS PARTY AS OF RIGHT AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

MOTION OF FORT HOWARD PAPER COMPANY TO INTERVENE AS PARTY AS OF RIGHT

Movant, Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") respectfully requests that this Court enter an order allowing it to intervene as a party for the following reasons. On July 10, 1978, the Petitioners, Aberdeen and Rockfish Railroad Company, et al. ("Railroads"), filed with the United States Court of Appeals for the District of Columbia a petition for review of the decision and order of the Interstate Commerce Commission ("Commission") in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977,* served June 29, 1978. Fort Howard, a party before the Commission below, filed a motion for leave to intervene as a matter of right pursuant to 28 U.S.C. § 2348 on July 20, 1978.

A copy of that motion to intervene is attached as Movant's Appendix A. Also on that date, the Respondent, the Commission and the United States, filed a motion to dismiss the petition for review, arguing that the court lacked jurisdiction to review a Commission order in a general rate increase proceeding.

By per curiam order filed July 25, 1978, the Court of Appeals granted the motion to dismiss the petition for review. Thereafter, by order filed July 27, 1978 the court dismissed as moot Fort Howard's motion to intervene, as well as similar motions filed by three other parties who had appeared before the Commission. This latter order is attached as Appendix B.

28 U.S.C. § 2348 authorized Fort Howard to intervene as a matter of right in the appeal before the United States Court of Appeals, and but for the court's order dismissing the Petitioners' appeal, Fort Howard would have been granted leave to intervene. Accordingly, in order to protect its interest and participate in this matter, it should be made a party to proceedings before this Court.

WHEREFORE, Fort Howard requests that this Court grant it leave to intervene as a party in support of the Respondents.

Respectfully submitted,

Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Fort Howard opposes the Petition for Writ of Certiorari sought by the Petitioners to review the order of the United States Court of Appeals for the District of Columbia entered on July 25, 1978 in *Aberdeen & Rockfish Railroad Company* v. *Interstate Commerce Commission and United States of America*, No. 78-1636.

DECISION BELOW

By per curiam order filed July 25, 1978, the United States Court of Appeals for the District of Columbia Circuit granted the motion of the United States and the

Interstate Commerce Commission to dismiss the railroads' petition for review of the decision and order of the Interstate Commerce Commission served June 29, 1978 in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977.*

JURISDICTION

28 U.S.C. § 1254(1) authorizes this Court in its discretion to issue writs of certiorari for review of cases from the United States Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals properly dismiss the railroads' petition for review from an opinion and decision of the Interstate Commerce Commission allowing general rate increases in amounts for certain commodities with which the railroads are dissatisfied?

STATUTES INVOLVED

The statutory provisions involved are Section 6(3) and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 6(3) and 13(1), which are set forth in full in Appendix C hereto.

STATEMENT OF THE CASE

By petition filed September 26, 1977, the railroads sought permission from the Commission to file a master tariff effective November 30, 1977 generally increasing their freight rates and charges by 5% subject to certain holddowns and exceptions. Said petition was docketed as *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977.*

By decision served September 29, 1977, the Commission authorized the filing of said master tariff, subject to protest and possible suspension, and provided for the filing of protests by persons opposing the proposed increases. Over 250 persons, including Fort Howard, filed protests to that master tariff.

The Commission served an order on November 10, 1977 declining to suspend the tariff, which allowed the 5% increase in rates and charges. However, in that order the Commission instituted an investigation into the lawfulness of the rates and charges for seven commodities, including recyclables. The Commission explained that it chose such commodities for investigation on the basis of the record and its analysis of the 1975 waybill sample which indicated for each commodity that over half of the revenue earned was associated with movements which returned revenue in excess of 180% of variable costs. Copies of the Commission's decisions served September 29, 1977 and November 10, 1977 are reproduced as Appendix D and Appendix E respectively.

After completing its investigation and considering the entire record, on June 29, 1978 the Commission served its decision herein and concluded that the railroads failed to justify a full 5% increase on the investigated commodities. The Commission stated in pertinent part:

> We find that while respondents have generally justified the 5-percent increase based on their overall revenue need (see November 10, 1977 order in this proceeding), they have failed to establish that the increases on the commodities under investigation are justified on the basis of the cost of pro-

viding the services in issue. This investigation was precipitated by the high rate/cost ratios exhibited by these commodities. In the context of this proceding cost evidence is important in determining whether the increases on these commodities are just and reasonable. The evidence produced by respondents does not fully justify the 5-percent increase. However, a lesser increase is justified due to the carriers' overall revenue needs. Taking this into consideration, the increases will not be denied in their entirety, but will be authorized in varying percentages. It should be noted that the proposed 5-percent increase, if authorized, would result in a disproportionate contribution by these commodities, a result not justified by the evidence in this proceeding.

(Pet. Ap. C, 35a-36a).

The Commission authorized general increases of either 2 or 3 percent for each of the 7 commodities involved and ordered the railroads to make appropriate refunds of the rates in excess of these amounts which they had been collecting at the 5% level.

The railroads filed a petition for review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit. The Interstate Commerce Commission and the United States filed a motion to dismiss the petition on the basis that Commission orders in general rate increase proceedings are not reviewable until after a complainant has exhausted his administrative remedies.

On July 25, 1978, the Court of Appeals filed an order granting the motion to dismiss and, thereafter, the railroads applied to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Fort Howard submits that a writ of certiorari should not be issued in this case because the decision below was clearly correct in dismissing the railroads' petition for review, and was not in conflict with any decisions of this Court or with those of any other circuit. As will be demonstrated, this matter is not novel and no compelling considerations of public policy exist to support the grant of a writ.

The Court Below Properly Dismissed The Railroads' Petition For Review Because That Court Lacked Jurisdiction To Review The Commission's Decision

Prior to discussing the appropriate principles of law which the Court of Appeals correctly applied in this case, it is important to observe that the Commission proceeding sought to be reviewed involved a general rate increase. The railroads were allowed to implement such increase and sought judicial review because they are disgruntled with the amount of the increase. Additionally, despite such increase, they complain about the policy discussions contained in the Commission's decision regarding the de-emphasis of the role of the general rate increase, which policy was obviously not applied in the instant case. The court below in its *per curiam* order recognized that complaints which either address the amount of a general rate increase or dicta incorporated into an administrative decision provide no basis for judicial review.

The prescription of freight rates is uniquely within the special expertise and qualifications of the Interstate Commerce Commission. *Atchison, Topeka & Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S.

800, 806 (1973); *United States* v. *Jones,* 336 U.S. 641, 652 (1949); *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 513 (1943); *Mississippi Valley Barge Line* v. *United States,* 292 U.S. 282, 286 (1934). On numerous occasions, this Court has recognized as axiomatic the principle that courts lack authority to make an independent appraisal of the reasonableness of rates determined by the Commission. *E.g., In Re Trans Alaska Pipeline Rate Cases,* —— U.S. ——, 98 S.Ct. 2053, 2058-59 (1978); *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Arrow Transportation Company* v. *Southern R. Co.,* 372 U.S. 658 (1963). The inappropriateness of judicial review has been particularly recognized in cases involving challenges to the Commission's action in approving general rate increases, the type of administrative activity under review.

In *Aberdeen & Rockfish Co.* v. *SCRAP,* 422 U.S. 289 (1975), (*"SCRAP"*) Mr. Justice White, speaking for this Court, detailed the broad nature of general revenue proceedings in which the country's railroads in large numbers seek across-the-board increases for all or nearly all of their rates. Both in *SCRAP* and in the instant proceeding, the Commission inquired into the issue of the railroads' revenue needs and to a lesser extent into the reasonableness of the increases as applied to certain broad categories of charges. These determinations are not subject to judicial review.

Starting with *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935), followed by a legion of cases, including the recent decision in *Council of Forest Industries of British Columbia* v. *I.C.C.,* 570 F.2d 1056 (D.C. Cir. 1978), the federal courts have consistently held that judicial review of

Commission orders in general rate proceedings is unavailable to review the application of such rate increases to particular commodities. The factual patterns in those cases typically involve shippers challenging the general rate increases as applied to their commodities, while the railroads have argued that judicial review is unavailable. Indeed, as observed by this Court in *SCRAP, supra,* 422 U.S. at 310:

> The railroads, but not the United States or the ICC, argue that the District Court had no jurisdiction to review the decision of the ICC, made in a general revenue proceeding, not to declare the increased rates unlawful. The argument is supported by a long line of District Court decisions; see, *e.g.,* Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487 (ED Va. 1935); Koppers Co. v. United States, 132 F.Supp. 159 (WD Pa 1955); Florida Citrus Comm'n v. United States, 144 F. Supp. 517 (ND Fla. 1956), aff'd per curiam, 352 U.S. 1021, 77 S.Ct. 589, 1 L.Ed. 2d 595 (1957); Atlantic City Electric Co. v. United States, 306 F. Supp. 338 (SDNY 1969), and Alabama Power Co. v. United States, 316 F.Supp. 337 (DC 1969), both aff'd by an equally divided Court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed 2d 212 (1970); Electronic Industries Assn. v. United States, 310 F.Supp. 1286 DC 1970), aff'd 401 U.S. 967, 91 S.Ct. 1188, 28 L. Ed. 2d 318 (1971).

Notwithstanding the posture of the parties in this case where the railroads are dissatisfied with the amount of their rate increases, this proceeding is but one of a host of appeals which have resulted in decisions recognizing that judicial review is inappropriate prior to the exhaustion of the complaintants' administrative remedies with the Commission. As stated

in *Council of Forest Industries of British Columbia* v. *ICC,* 575 F.2d 1056, 1061:

> Since the ICC normally limits itself in general revenue proceedings to broader issues and expressly reserves judgment on whether any particular rate instituted under the general ceiling would be just and reasonable, the courts have concluded that the ICC's general action leaves questions about particular rates open to be determined in later proceedings focusing on individual applications of the general increase. Judicial review is held to be available only after the appropriate administrative remedies have been exhausted.

In instances where the protestant is a shipper, the appropriate administrative remedy is found in 49 U.S.C. § 13 which authorizes the shipper to file a complaint regarding a particular rate for a specific commodity along a defined route. See *Atlantic City Elec. Co.* v. *U.S.* 306 F. Supp. 338 (S.D.N.Y. 1969); and *Alabama Power Company* v. *U.S.,* 316 F. Supp. 337 (D.C. 1969), both aff'd by an equally divided court, 400 U.S. 73 (1970). In cases involving a railroad complainant the appropriate remedy is contained in 49 U.S.C. § 6(3) which allows the railroad to file for an increase in its tariff, again, a particular rate for a specific commodity along a defined route, and the Commission's decision in granting increases does not preclude the railroad from exercising its rights contained in Section 6 of Title 49.

On page 11 of the Memorandum filed in support of their motion to stay pending review, the railroads recognized: "At the outset, there is a question concerning the reviewability of the Commission's June 20 order because it was issued in the context of a general

revenue proceeding." The court of appeals had no difficulty in recognizing that question and dismissing the railroad's petition. On appeal, the railroads weakly contend that their case is somehow different from the long line of cases denying review because they are carriers and not shippers, a distinction without a difference since both have further administrative remedies available under the Interstate Commerce Act.

Finally, the alleged error of the Commission arising from its statement regarding de-emphasis of the role of general rate increases provides no basis for departing from the established role concerning judicial review of decisions in general rate increase proceedings. In the first place, there was no such error. However, assuming, *arguendo,* any misinterpretation of the statute, the Commission clearly ignored its *dicta* in granting the general rate increase. Its action in doing so is not reviewable since the railroads have an administrative remedy available to them.

CONCLUSION

It is ironic that the railroads, which have long denied the reviewability of Commission determinations involving general rate increases, are seeking a writ from this Court to determine the correctness of a Commission proceeding of that nature. The petitioners have raised no serious challenge to the action of the court of appeals in dismissing this appeal. And, in view of the railroads' right to file new tariffs, it is unlikely that the decision below will have any extensive impact on the railroads generally.

For all of these reasons, Fort Howard respectfully urges that this Court deny the petition for writ of certiorari.

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Of Counsel:

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APPENDIX

APPENDIX A

IN THE
UNITED STATES OF COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-1636

ABERDEEN and ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA, *Respondents.*

[Received July 20, 1978]

MOTION FOR LEAVE TO INTERVENE

The Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") hereby moves this Court for leave to intervene in the above captioned action in support of the Respondent Interstate Commerce Commission, and respectfully states as follows:

1. On July 10, 1978, the Aberdeen and Rockfish Railroad Company *et al* filed a petition in this Court seeking review of the Decision and Order of the Interstate Commerce Commission in *Ex Parte No. 343, Nationwide Increased Freight Rates and Charges, 1977,* dated June 28, 1977, served on June 29, 1978.

2. This Motion for Leave to Intervene is filed pursuant to 28 U.S.C. § 2348. This Court has jurisdiction of this Motion for Leave to Intervene pursuant to 28 U.S.C. §§ 2321 and 2341 *et seq.*

3. Fort Howard was a party in the proceeding before the I.C.C. below and its interests will be affected if the

order of the I.C.C. is or is not set aside. Thus pursuant to 28 U.S.C. § 2348 it is entitled to appear and be represented by counsel in this proceeding to review the Interstate Commerce Commission's order.

WHEREFORE, the Fort Howard Paper Company of Green Bay, Wisconsin respectfully requests that it be made a party of record herein.

Respectfully submitted,

FORT HOWARD PAPER COMPANY
P.O. Box 130
Green Bay, Wisconsin 54305

By: WILLIAM L. SLOVER
C. Michael Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
Attorneys & Practitioners

OF COUNSEL:

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Date: July 19, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents*

[Filed July 27, 1978]

ORDER

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,
2. The Fort Howard Paper Company of Green Bay, Wisconsin
3. Allied Chemical Corporation, et al.,
4. PPG Industries, Inc.

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that the aforesaid motions for leave to intervene are denied as moot.

FOR THE COURT

GEORGE A. FISHER, CLERK

/s/ DANIEL M. CATHEY
Daniel M. Cathey
First Deputy Clerk

APPENDIX C

Relevant Statutes

* * *

§ 6

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

* * *

§ 13

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

[Service Date September 29, 1977]

ORDER

EX PARTE NO. 343

NATIONWIDE INCREASED FREIGHT RATES AND CHARGES—1977

(Authority to File Master Tariff)

By petition and verified statements filed September 26, 1977, the railroads listed in Appendix I of the petition, and certain water and motor carriers having joint rates with the Appendix I railroads, request the Commission to institute an investigation into the adequacy of freight rates and charges of all railroad common carriers within the United States. Petitioners request that all such railroad common carriers be made respondents in such investigation. Petitioners ask that the Commission authorize and permit increases in freight rates and charges from, to, and within all territories of 5 percent, effective November 30, 1977, to offset labor cost increases and increases in the cost of materials, suplies, and certain other items, subject to exceptions and holddowns set forth in Appendix II of the petition.

Petitioners seek permission to make the proposed increases effective November 30, 1977, subject to the condition that refunds shall be made in the event that, after any investigation that the Commission deems necessary, no increase or a lesser increase than that requested is authorized. Petitioners also seek entry of an order modifying all outstanding Commission orders to the extent necessary to enable the railroads to file and make effective the proposed increased rates and charges. Such order is also requested to allow the entry of appropriate orders under Sections 4 and 6 of the Interstate Commerce Act.

The petitioners have filed and served 30 verified statements constituting their evidential case pursuant to the requirements set forth in *Procedures Governing Rail Carrier General Increase Proceedings,* 49 CFR 1102, including certain financial data suggested in Appendix B of the report and order in Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288. Petitioners have also submitted data of the type called for in Ex Parte No. 290 (Sub-No. 1), *Procedures—Rail Car General Increase Proceedings,* 349 I.C.C. 22, namely detailed information on estimated revenues which would have been obtained had the last authorized increase been fully applied, and the actual total increase in revenues realized by application of the last authorized general increase.

The petitioners have given notice of the petition and have furnished data to the public in compliance with Ex Parte No. 286, *Notices of Increases in Frt. Rates and Pass. Fares,* 349 I.C.C. 741, and with section 5b of the Interstate Commerce Act.

The petitioners have also submitted information of the type called for in Ex Parte No. 55 (Sub-No. 4), *Revised Guidelines for the Implementation of the National Environmental Policy Act of 1969,* 352 I.C.C. 451 and 49 CFR 1108, namely a supplemental evaluation of environmental considerations with regard to the petitioners' increased rate proposal. The petitioners contend that the requested increases will have no significant adverse effects upon the movement of the traffic or transportation of recyclable commodities by rail. Any person or persons believing that the requested increases, if authorized, would have a significant impact upon the quality of the human environment are invited to comment upon this matter in verified statements authorized to be filed pursuant to this order. Environmental matters and the requirements of the National Environmental Policy Act of 1969 will be fully considered by this Commission in any subsequent action on the merits of the requested general increases.

By Special Permission Order No. 77-5350, served in conjunction with this order, the Commission is authorizing the filing of tariff schedules increasing rates and charges sought in the petition. These tariff schedules are to become effective upon not less than 30 days' notice to the Commission and the general public, subject to protest and possible suspension as provided by the Interstate Commerce Act. By this Special Permission Order, the Commission is also authorizing the modifying of outstanding orders to the extent necessary to permit this filing.

It is ordered, That all common carriers by railroad be, and they are hereby, made respondents to this proceeding.

It is further ordered, That pursuant to the special permission authority granted in conjunction with this order, the tariff schedules shall be published and filed upon not less than 30 days' notice effective not earlier than November 30, 1977, nor later than December 30, 1977,[1] *subject to protest and possible suspension.* These schedules are to contain an appropriate refund provision. Verified statements shall be filed on or before October 28, 1977, in accordance with the procedures as outlined in the following paragraph.

It is further ordered, That any person opposing or wishing to comment on the proposed 5-percent increase in rates and charges shall file and serve verified statements,[2] as provided below.

(a) The verified statements shall contain all evidence relevant and material to the issues in this proceeding which the parties desire to have considered by the

[1] In the event the tariff is not filed prior to October 10, 1977, the due date specified for the filing of protests and verified statements will be extended to a date 20 days prior to the effective date, and the reply date will be correspondingly extended.

[2] Section 15(3)(d) of the Interstate Commerce Act specifically requires the filing of vertical complaints seeking suspension of proposed rate changes.

Commission, as a basis for a decision on the merits. Any submission on asserted environmental impact shall be set forth under an appropriate subheading in order to identify properly such subject matter.

(b) Verified statements may include arguments in support of an affiant's position but such argument shall be set forth in a separate section of the document containing the verified statement. If desired, such argument may be contained in a separate document simultaneously filed and served.

(c) Each verified statement shall be signed in ink by affiant and verified (notarized) in the manner provided by Rule 48 and Form No. 6 of the Commission's General Rules of Practice (See 49 1100.48 and Appendix B, Form No. 6, to 49 CFR 1100). The post office address of affiant or his counsel shall be shown.

(d) Verified statements and arguments shall be filed and served as follows:

The original and 20 copies of each such document for the use of the Commission shall be addressed to the Secretary, and sent to the Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C. 20423, except that a lesser number of copies may be filed upon showing of good cause. All documents filed with the Commission in this matter shall contain the following notation on the envelope: *Ex Parte No. 343.*

One copy shall be served upon the representative of the petitioning railroads, James L. Howe, III Esq., 527 American Railroads Building, 1920 "L" Street, N.W., Washington, D.C. 20036, which service shall constitute service upon all respondents. However, all parties able to do so shall serve 20 copies upon the

railroads' representative. In all cases, where service is made by mail, the document shall be mailed in time to be received by the respective due dates.

(e) Each verified statement shall contain a certificate of service stating that it has been timely served on opposing parties, as herein provided.

(f) Verified statements and arguments by persons opposed to the proposed increases in rates and charges shall include all matters which they desire the Commission to consider with respect to statutory suspension of the rates pending completion of the investigation, as well as evidence relevant to the ultimate decision.

It is further ordered, That on or before November 4, 1977, the respondents shall file with the Commission and serve upon opposing parties such replies to protests or other pleadings seeking suspension, and rebuttal evidence on the merits of the proceeding as they desire to present. Such evidence shall be in the form and served in the same manner as the opening statements filed in accordance with the regulation published in 49 CFR 1102, except that replies and rebuttal evidence need be served only upon the party (and his counsel if known) to whose evidence the reply or rebuttal is directed. However, replies or rebuttal statements proposing changes in the tariffs shall be served on all parties. All such statements shall be furnished to interested parties upon request.

It is further ordered, That the request for fourth-section relief will be considered following the filing of verified statements and replies.

And it is further ordered, That in all other respects the petition be, and it is hereby, denied.

SPECIAL PERMISSION No. 77-5350

It is ordered, for good cause shown:

1. All railroads, and water and motor carriers to the extent they have joint rates with the railroads, and their tariff-publishing agents, be, and they are hereby, except as otherwise provided herein, authorized to depart from the Commission's tariff publishing rules in Tariff Circular No. 20 (49 CFR 1300), when publishing and filing tariffs, and tariff amendments, to become effective upon not less than 30 days' notice to the Commission and the public but not earlier than November 30, 1977, nor later than December 30, 1977, providing for increased rates and charges as set forth in the petition:

(a) By publishing and filing a master tariff of increased rates and charges, and supplements to the master tariff, providing increases by means of conversion tables of rates and charges, which shall include, and maintain in effect, a refund provision reading as follows:

In the event any increases resulting from the application of this tariff exceed the increases subsequently approved or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the increase resulting from the application thereof and any increases which may subsequently be approved or prescribed by the Interstate Commerce Commission with __ percent interest.[3]

In the event any increase resulting from the application of this tariff is disapproved by the Commis-

[3] The interest rate to be inserted in the refund provision shall be equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. See Section 15(8)(e) of the Interstate Commerce Act.

sion and no increase is authorized, the carriers will refund the full amount of the increase collected with ___ percent interest.[4]

The master tariff shall be indicated to expire on interstate and foreign commerce with a date not beyond one year after the effective date, which may not be extended or cancelled except upon specific authorization of this Commission, and all relief granted in this order expires with that date. The master tariff must initially contain all provisions for application of the increases (including provisions for no increase, part of the overall proposal) following which (unless suspended) any provisions other than those of a general character may be cancelled and transferred to the particular tariff affected upon a common effective date with appropriate notation to that effect in the master tariff amendment.

(b) By publication and filing of a connecting link supplement to each tariff to be made subject to the master tariff, connecting such tariffs with the master. Such supplements may be blanket supplements (a common supplement issued to two or more tariffs).

(c) The master tariff and connecting link supplements issued and filed under this order shall not provide for nonapplication on interstate traffic competitive with intrastate traffic between the same points unless the interstate rates and routes are specifically identified in the connecting link supplements.

(d) By publication and filing of tariffs or amendments to tariffs effective concurrently with the master tariffs and upon the same notice which provide specifically increased rates and charges but which do not result in an increase in charges for transportation and

[4] See, footnote 3.

other services greater than those specified in the petition, provided all such publication is identified in the tariffs and made subject to a refund clause worded substantially as in paragraph 1(a) above.

(e) By publication of provisions in tariffs or amendments thereto subjecting rates and charges therein to the provisions of the master tariff, subject to the restriction in (c) above.

2. (a) The master tariff, as amended, and all other tariffs and amendments to tariffs, that employ the short-form methods authorized herein shall bear the notation:

Form of publication authorized,
I.C.C. permission No. 77-5350

(b) Tariffs or amendments to tariffs publishing specifically increased rates or charges hereunder shall bear a notation reading:

Publication made in accordance
with I.C.C. permission No. 77-5350

3. Connecting-link supplements authorized herein shall be exempted from the Commission's tariff-publishing rules governing the number of supplements and the volume of supplemental matter permissible.

4. The master tariff filed under this order shall not be amended except to correct errors and to comply with findings and orders of the Commission, except when specifically authorized to do so. The terms of rule 9(e) (40 CFR 1300.9 (e)) are not waived as to supplements to the master tariff.

5. Outstanding orders of the Commission are hereby modified only to the extent necessary to permit the filing of tariff publications containing the proposed

increases, and all tariff publications filed shall be subject to protest and possible suspension and rejection. In that regard, we direct petitioners' attention to our admonitions in prior general increase proceedings concerning maintenance and preservation of existing port relationships. See, for example, *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 288, 336, and *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 188. The rate increase table on grain shall progress in one-half cent increments.

It is further ordered, That future orders and notices of the Commission in this proceeding will be sent only to those participating as herein provided, and those interested persons who specifically request to be included on the service list.

And it is further ordered, That notice of this order be given by serving a copy thereof on each party to the proceedings in Ex Parte No. 336, to the Governor and public utility regulatory body of each State, the Environmental Protection Agency, the Special Assistant to the President for Consumer Affairs, and by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register for publication in the Federal Register.

Decided September 29, 1977.

By the Commission.

H. G. Homme, Jr.
Acting Secretary

(Seal)

APPENDIX E

Interstate Commerce Commission

Order

Ex Parte No. 343

[Service Date—November 10, 1977]

Nationwide Increased Freight Rates and Charges—1977

In an order served September 29, 1977, we permitted the filing of a master tariff, subject to protest and possible suspension, providing for publication of increases in all freight rates and charges from, to, and within all territories of 5 percent, effective November 30, 1977, subject to specified exceptions. The justification for the proposed increase, as presented in verified statements filed by the carriers, is to offset labor cost increases and increases in the cost of materials, supplies, and certain other items.

The record in this proceeding consists of (1) the initial petition and verified statements of the railroads filed September 26, 1977; (2) the order of the Commission served September 29, 1977; (3) the Tariff of Increased Rates and Charges X-343, as supplemented; (4) the 263 protests and/or verified statements; (5) the railroad replies thereto; and (6) oral argument held before the Commission on November 8, 1977.

The record discloses that the revenue yield from the proposed 5-percent increase will not exceed the increased costs of labor, materials, supplies, and other items not previously considered in Ex Parte No. 336 and cost increases that have occurred since the last general increase. Without a 5-percent increase in rates and charges, sufficient funds will not be available to the railroads to defray the cost escalations shown of record. Furthermore, it is estimated that the added revenue expected from the proposed increase will fail to meet the cost escalations which have already been

incurred and those which are imminent nationwide and in all territories. Thus, it appears that the proposed increase is necessary to prevent a further decline in the railroads' overall financial condition. This is evidenced by the carriers' rate of return which, nationwide, is 1.68 percent for the twelve months ending June 30, 1977, and does not exceed 5.12 percent in any district (See, *Increased Freight Rates and Charges, 1973,* 344 I.C.C. 589, 614).

We conclude that the record in this proceeding warrants a finding that the Commission should decline to exercise its authority to suspend X-343, as supplemented, conditioned upon the carriers filing of a supplement, on no less than 5 days' notice, to become effective November 30, 1977, providing as follows:

1. That the increase on feed grains from Midwestern origins to New England points shall be no greater than 3 percent.

2. That there shall be no increase on wood chip rates in the Items 165 and 180-series, MP Tariff 86-G, ICC 629, on interstate traffic.

However, the Commission will order an investigation, directed to the commodities listed below. These commodities have been selected on the basis of the record and our analysis of the 1975 waybill sample which indicates that, in each case, over half of the revenue earned by the commodity is associated with movements which returned revenue in excess of 180 percent of variable cost.[1] We have considered in detail the protests and verified complaints filed in opposition to the proposed increase on other commodities, including grain. With regard to the latter, an investigation does not appear warranted at this time, particularly in view of the pendency of Ex Parte No. 270 (Sub-No. 9), Investigation of Railroad Freight Rate Structure—Grain and Grain Products.

[1] The analysis of these commodities is based on a burden type study of the 1975 1% waybill sample performed in support of the Commission's recent study, the Impact of the 4-R Act, Railroad Ratemaking Provisions, submitted to the Congress October 5, 1977. The study will be made available by the Commission's Bureau of Economics.

It is ordered:

1. That an investigation be instituted into the lawfulness of the rates, charges and regulations, as set forth in the Tariff of Increased Rates and Charges, X-343, as supplemented, on the following:

		SPC No.
1.	Newsprint Paper	57
2.	Sodium Alkalies	69
3.	Industrial Gases	71
4.	Sulphuric Acid	73
5.	Rubber, Natural or Synthetic	78
6.	Manufactured Iron or Steel	100
7.	Recyclables	NA

A further order will be issued in the near future setting procedures to be followed in this investigation.

2. That all parties are requested to submit separate briefs on the question of the interrelationship of the special rate provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) and railroad general increase proceedings. Briefs are to be submitted by railroad respondents no later than 20 days from date of service of this order, and 20 days thereafter by all other parties.

In making effective any increases permitted herein, the carriers are required to protect and maintain all existing port relationships, duly established by order of the Commission or recognized customs of the trade, and to observe the prohibitions of the Interstate Commerce Act with re-

gard to unjust discrimination and undue and unreasonable preference and prejudice.

Respondents are required to continue on a priority basis their efforts to bring tariff schedules up to date, particularly in the East, where the updating has not been as substantial as in other territories, and they shall report their progress to the Commission's Bureau of Traffic on a quarterly basis until otherwise ordered.[2]

As noted above, an investigation has been instituted with regard to the rates on recyclable commodities. In connection with our decision not to suspend, the following should be noted. Increases in recyclable rates in Ex Parte No. 295 (Sub-No. 1), *Increased Freight Rates and Charges, 1973—Recyclable Materials,* and Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials,* were found to have a small, and insignificant impact on the environment profiles in the recycling industry, since non-price factors were found to be more important than changes in freight rates. The record here presents no new information, studies, or critiques which would warrant conclusions different than those in the previously cited reports. Accordingly, we conclude that this action will not significantly affect the quality of the human environment. In addition, the energy impacts of this action will not be significant within the meaning of the National Environmental Policy Act of 1969 in view of the fact that potential diversion should be minimal in light of general inflationary trends, higher freight rates for other modes, and the railroads' stated intention to adjust rates when faced with competition from other modes.

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[2] Pursuant to section 209 of the 4-R Act, it is required that all rates be incorporated into the individual tariffs of each railroad or ratemaking association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved the Commission, whichever is later.

We note that the procedures established in Ex Parte No. 290, *Procedures Governing Rail General Increase Proceedings,* will become effective January 1, 1978. The carriers are hereby advised that this Commission expects full compliance with those regulations in all future rail general increase proceedings. Failure to comply may result in denial of the carriers' petition.

All outstanding orders of the Commission are modified to the extent necessary to permit the proposed increases to become effective. Should the carriers be unwilling to comply with the condition set forth on page 1 of this order, we will reconsider our decision not to suspend.

FOURTH SECTION ORDER NO. 20536

It appearing, That respondent railroads applied for relief from the provisions of Section 4 of the Act necessary to establish the rates and charges originally sought; that the increases in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or changes that yield greater compensation in the aggregate for the transportation of the like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than the aggregate-of-intermediate rates or charges subject to the Act, in contravention of Section 4 thereof; that the increased cost of railroad operation necessitates the increases in rates and charges involved in this proceeding which cannot be made effective without fourth-section relief; that application of the increased charges to or from more distant points will not result in the establishment of rates to or from more distant points that are not reasonably compensatory; that no protestant adequately opposed issuance of the fourth-section relief sought on the ground that it would be adversely affected by the fourth-section departures that may be created by the increased rates; and that a special case has been presented in which the Commission may authorize relief from the provisions of Section 4;

It is ordered, That carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to establish and maintain the increased rates and charges described herein without observing the provisions of Section 4 of the Act;

It is further ordered, That parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges permitted to become effective in this order without observing the long-and-short haul provisions of Section 4 of the Act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by the failure of the State authorities to authorize the full increases permitted in this proceeding;

And it is further ordered, That in those instances in which rates in contravention of Section 4 are established under authority contained herein, the schedule containing such rates shall make reference to this order in the manner required by Rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION No. 77-5350 AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF AND ORDER REGARDING SPECIAL PERMISSION No. 398

It is ordered:

That Special Permission No. 77-5350 be, and it is hereby, amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions and limitations provided therein.

Pursuant to Special Permission Application No. 398 filed October 31, 1977, Western Trunk Line Committee, Agent, proposes to amend various items of Tariff of Increased Rates and Charges X-343, WTL ICC A-5067, on behalf of all railroad parties to the X-343 proceeding and other agents and carriers.

The applicant proposes to amend on 15 days' notice, effective no earlier than November 30, 1977, Item 55 under Non-Application of Increases" by including line-haul rates on Wood Chips (Pulpboard) and related articles, as published in Items 165 and 180-series, MP Tariff 86-G, ICC 629 on Interstate Traffic, to those rates not taking the increase. The provision is to expire on December 31, 1977, with the carrier stating that this is in accordance with their commitment to the paper industry to forego any further increases in 1977. By provisions of the Commission's order authorizing the X-343 increases in freight rates and charges, the increase will not apply on wood chip rates named in the issue tariff. Therefore, this portion of the special permission application is moot.

The applicant proposes to amend on 15 days' notice, Item 1455 of the X-343 master tariff, Auto Parts, to provide that line-haul rates on Auto Parts are not subject to increases in Eastern Territory, by deleting all words following "referred to in Note 24", thereby making the deferral of increases applicable to all rates in the East on auto parts and accessories. The applicant contends it was their original intent to provide for this application of the item.

It is ordered, That the application with regard to the proposed amendment of Item 1455 of the X-343 master tariff on 15 days' notice is granted.

Authority is also requested to amend Items 77 of the X-343 master tariff, on statutory notice, by adding a paragraph that paper and paper articles listed in Item 585 of SFTB Tariff 867-F, ICC S-1181 will not be subject to increases on line-haul rates, except the increases will apply on certain minimum weights from Southern Territory to points in Eastern Territory. Also, it is proposed that Item 930 of the X-343 master tariff, listing increases on paper and paper articles, be canceled.

It is ordered, That the application with regard to the proposed amendment of Item 77 and 930 of the X-343 master tariff on 30 days' notice is granted.

Authority is also requested to amend Item 925 of the X-343 master tariff, Newsprint, on statutory notice, by adding a paragraph which will make the increase applicable from Red Rock, Ont. to stations in Eastern Territory on rates subject to minimum weights of 100,000 pounds. The applicant states that this will correct an anomalous situation because newsprint paper rates have been historically maintained at the same level as Thunder Bay, Ont., which is subject to the 5 percent increase.

It is ordered, That the application with regard to the proposed amendment of Item 925 of the X-343 master tariff on 30 days' notice is granted.

The applicant also proposed to amend Item 1440 of the X-343 master tariff which now provides for a 5 percent increase, except for no increase from Warwick, Ind. to points in Eastern Territory. The proposal will cancel the first portion of the Item embracing STCC 33 341 15 through STCC 36 999 10, thus providing no increase on these items. The proposal will amend the second portion of the Item by eliminating the exception on movements from Warwick, Ind. to Eastern points, thus allowing the increase to apply.

It is ordered, That the application with regard to the proposed amendment of Item 1440 of the X-343 master tariff is granted with authority to publish on 30 days' notice.

Except as otherwise authorized, the permission granted with respect to all the above items does not modify any outstanding formal orders of the Commission nor waive any of the requirements of its rules relative to the construction and filing of tariff publications. Publications issued and filed under this permission shall bear the following notations in conjunction with the particular matter to which the permission related:

Issued on [*] days' notice; Permission No. 77-5350."

Decided November 8, 1977.

By the Commission. (Commissioner MacFarland did not participate.)

H. G. Homme, Jr.
Acting Secretary

(Seal)

Chairman O'Neal, concurring:

The respondents have addressed the issue of the impact of percentage general rate increases on long haul-short haul rate relationships in this proceeding to a greater extent than they have in the past. The discussion acknowledges the existence of the situation and defends the carriers' practices in addressing it. However, the discussion does not really come to grips with the basic issue of how to fairly distribute the burden of increased costs between long and short hauls. The respondents' discussion is a start toward what I hope will be a thorough discussion of this issue.

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*Insert appropriate notice as authorized.

APPENDIX I

PART 1043—SURETY BONDS AND POLICIES OF INSURANCE

Sec.

AUTHORITY: The provisions of this Part 1043 issued under 49 Stat. 546, amended, 554, as amended, 557; 49 U.S.C. 304, 311, 315.

CROSS REFERENCE: Prescribed forms relating to this part are listed in Part 1003 of this chapter.

[¶ 683]

§ 1043.1 Surety bond, certificate of insurance, or other securities.

(a) *Property damage; public liability.* Except as provided in paragraph (c) of this section, no common or contract carrier subject to Part II of the Interstate Commerce Act shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission a surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements, in the amounts prescribed in § 1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to Part II, Interstate Commerce Act, or for loss of or damage to property of others.

(b) Common carriers—cargo insurance; exempt commodities. Except as provided in paragraph (c) of this section, no common carrier by motor vehicle subject to part II of the Interstate Commerce Act shall engage in interstate or foreign commerce, nor shall any certificate be issued to such a carrier or remain in force unless and until there shall have been filed with and accepted by the Commission, a surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements in the amounts prescribed in § 1043.2, conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service: *Provided,* That the requirements of this paragraph shall not apply in connection with the transportation of the following commodities:

FEDERAL CARRIERS REPORTS

Sec.

Agricultural ammonium nitrate.
Agricultural nitrate of soda.
Anhydrous ammonia—used as a fertilizer only.
Ashes, wood or coal.
Bituminous concrete (also known as blacktop or amosite), including mixtures of asphalt paving.
Cement, dry, in containers or in bulk.
Cement, building blocks.

Charcoal.
Chemical fertilizer.
Cinder blocks.
Cinders, coal.
Coal.
Coke.
Commercial fertilizer.
Concrete materials and added mixtures.
Corn cobs.
Cottonseed hulls.
Crushed stone.
Drilling salt.
Dry fertilizer.
Fish scrap.
Fly ash.
Forest products; viz: Logs, billets, or bolts, native woods, Canadian wood or Mexican pine; pulpwood, fuel wood, wood kindling; and wood sawdust or shavings (single tow) other than jewelers' or paraffined.
Foundry and factory sweepings.
Garbage.
Gravel, other than bird gravel.
Hardwood and parkay flooring.
Haydite.
Highway construction materials, when transported in dump trucks and unloaded at destination by dumping.
Ice.
Iron ore.
Lime and limestone.
Liquid fertilizer solutions, in bulk, in tank vehicles.
Lumber.
Manure.
Meat scraps.
Mud drilling salt.
Ores in bulk, including ore concentrates.
Paving materials, unless contain oil hauled in tank vehicles.

Peat moss.
Peeler cores.
Plywood.
Poles and piling, other than totem poles.
Potash, used as commercial fertilizer.
Pumice stone, in bulk in dump vehicles.
Salt, in bulk or in bags.
Sand, other than asbestos, bird, iron, monazite, processed, or tobacco sand.
Sawdust.
Scoria stone.
Scrap iron.
Scrap steel.
Shells, clam, mussel, or oyster.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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January 30, 1979

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Respondents.

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Petitioners, Aberdeen and Rockfish Railroad Company, *et al.*, pursuant to Rule 24 of this Court's Rules, submit the following as their reply to the briefs in opposition to their Petition for a Writ of Certiorari filed herein:

PRELIMINARY STATEMENT

The briefs in opposition filed by the Respondents and by certain intervening shippers rest principally on the contention that the decision of the Interstate Commerce Commission which, after consideration of the variable-cost/revenue relationships related to specific commodity groups, imposed selective holddowns is not reviewable. They contend that the Court of Appeals correctly dismissed the railroads' petition for review on the strength

of *Algoma* and subsequent cases which hold that Commission orders in general rate increase proceedings are not reviewable at the behest of shippers complaining of the application of a general increase to the rates on individual commodities.

This contention is misplaced; the reasons underlying the holding in *Algoma* and subsequent cases have no applicability to the circumstances presented in this case and, therefore, provide no support for the Court of Appeals determination that the Commission's order challenged by the railroad petitioners is not judicially reviewable.

I. THE *ALGOMA* LINE OF CASES IS INAPPLICABLE SINCE THE RAILROADS, UNLIKE SHIPPERS, HAVE NO ALTERNATIVE ADMINISTRATIVE REMEDY

Respondents contend that because shippers cannot obtain judicial review of Commission general increase orders insofar as the increase applies to the rates on individual commodities (*Algoma* and subsequent cases, see Petition, pp. 5-9), so too the railroads should, as a "corollary of that principle" (Respondent, p. 6), be denied judicial review of Commission orders in general increase proceedings imposing holddowns on selected commodities. This contention ignores both the nature of the proceedings conducted by the Commission in the investigative phase of Ex Parte No. 343 with respect to selected commodity groups and the significant differences in the availability of administrative remedies to shippers and to the railroads.

At the outset, it is important that this Court clearly understand the differences between the Commission's actions in this case and the actions found to be nonreviewable in other general rate increase cases. As all parties seem to agree, in a general rate increase case

the Commission has traditionally concentrated on the overall costs, and the consequent general revenue needs, of the carriers. To the extent that the Commission has imposed holddowns on increases for any particular traffic, such holddowns have been based on determinations either that, because of competitive conditions, the particular increase would not result in additional revenues for the railroads (thus not implementing the purpose of the general increase), or that, by virtue of voluntary "flag-outs" by the railroads, application of the increase to certain rates would result in discrimination. Such actions by the Commission have not led the carriers to seek judicial review, since these decisions have been the kind of tentative decisions reached in the context of a general rate increase proceeding.

In this case, by contrast, the Commission elected to undertake an investigation into the justness and reasonableness of the resulting rates on seven specific commodity groups, based upon consideration, not of general cost increases and revenue needs of the carriers, but of the specific costs and revenues allegedly related to those commodity groups.

Under the Commission's prior practice, the consideration of such issues would have been left to proceedings instituted by the affected shippers and receivers pursuant to Sections 13 and 15 of the Act. And the results of such proceedings would, unarguably, have been subject to judicial review at the instance of either the shippers or the carriers.

Here, the Commission has undertaken precisely the kind of particularized inquiry with respect to the commodity groups at issue which would arise in a proceeding instituted under Sections 13 and 15, not the broad review of carrier revenue needs, unrelated to particular rates or particular commodities, which is the hallmark of the conventional general revenue proceeding. Having elected to proceed in this fashion, the Commission now

seeks to preclude review of its action by relying solely on the fact that this specific investigation of the justness and reasonableness of the resulting rates on specific commodities was conducted as an adjunct of a general revenue proceeding.

The *Algoma* cases rest on the proposition that shippers, complaining of the application of a general increase to the rates on individual commodities, have available to them administrative remedies which can be utilized to challenge the individual commodity rates (as increased) and that those remedies must be exhausted. Respondents contend that the railroads too, in the event the Commission holds down the increase in respect of certain commodities, have alternative remedies available to them which must be exhausted. Specifically, Respondents contend that the railroads, when confronted in a general increase proceeding with a Commission-ordered hold-down affecting the rates on a particular commodity, may start all over again by filing an individual tariff of increased rates as to that commodity under Section 6(3) of the Act and thereby secure a hearing under Section 15(8). This, Respondents contend, is the administrative equivalent of the complaint which a shipper may file under Section 13(1) and the hearing he may thereby obtain under Section 15(1).

The Respondent's contention is untenable. There are significant defferences between the administrative relief available to shippers and the illusory "relief" available to carriers which both the Respondents and intervenors ignore.

The general rate increase proceeding, as opposed to the filing of literally thousands of individual tariffs of increased rates, has been justified on the basis of the practicalities involved and the need for prompt action to meet the overall revenue needs of the carriers when faced with cost increases which affect their general business, rather than the costs of providing specific services. The

use of general rate increase, or general revenue needs, procedure has been judicially sanctioned when "accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable." *United States* v. *Louisiana*, 290 U.S. 70, 77 (1933). For this reason, the Commission conventionally states in its general increase authorizations, as it did in the Ex Parte No. 318 proceeding, for example, that

> ". . . our findings apply to the general bases of rates and charges and do not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed and will be subjected to complaint and investigation as provided by the Interstate Commerce Act" (*Increased Freight Rates and Charges—1976*, —— I.C.C. ——, —— (1976)).

Thus, the rights of shippers to proceed by complaint to secure administrative consideration of justness and reasonableness of specific rates or rates for an individual commodity are carefully preserved.

The rights of the shippers are substantial. They may, as noted, file a complaint under Section 13(1) of the Act challenging the lawfulness of the individual commodity rate (as increased) and obtain a hearing under Section 15(1). If the Commission finds the challenged rate to be unlawful, it may prescribe lawful rates for the future and either require refunds or award reparations for excess charges paid with respect to prior shipments. Shippers are generally protected in general increase proceedings by the imposition of the refund rule; indeed, such a rule is now mandated by statute (49 U.S.C. § 15 (8) (e)).[1]

[1] Prior to enactment of the 4-R Act in 1976, the imposition of a refund rule was left to the Commission's discretion.

In contrast, the railroads have no such protection; and unless they can secure review of a particularized inquiry into the reasonableness of rates for specific commodities such as that made here, they may be effectively and permanently denied the benefit of the increased rates with respect to the affected commodities for a substantial period of time, even if the Commission erred. Here, the Commission selected the rates on seven commodity groups for investigation and, although the Commission did not suspend the increase for the statutory seven-month period (49 U.S.C. § 15(8)(b)), the railroads were denied substantial revenue when at the conclusion of its investigation the Commission found that the rates on those commodities, increased by more than three percent in some instances and two percent in others, were not just and reasonable and directed the railroads to make appropriate refunds.[2] Respondents now contend that the railroads are not entitled to judicial review of the Commission's action because they have an alternative administrative remedy—the right to file individual tariffs of increased rates, and "thus to trigger a particularized inquiry [under Section 15(8)] that may be judicially reviewed" (Respondents' Brief, p. 6). In other words, the railroads can't complain, even though they are denied review of the Commission action which denies them a revenue increase, because they are free to start the process of seeking an increase all over again.

The alleged administrative remedy provided by the right to refile its proposed rate increase is at best illusory. The railroads have already been denied the

[2] The Commission's action in Ex Parte 343 stemmed from its erroneous interpretation of the 4-R Act as necessitating a de-emphasis of the role of the general increase in railroad rate-making. Respondents contend that that interpretation is not subject to judicial review as it is only an "incidental expression of policy." The Commission's interpretation cannot be so characterized; it is that interpretation which prompted the Commission to assume for itself "the ability to impose holddowns and exceptions where necessary in a general increase proceeding."

benefit of the increased level of rates for the period consumed by the Commission's Ex Parte 343 investigation. If the railroads should file individual tariffs of increased rates with respect to these commodity groups, they face a seven- to ten-month suspension of the proposed increase, resulting in a further loss of revenue, even if the increases are found to be justified (49 U.S.C. § 15(8)(a)). Thus, under the so-called remedy advocated by Respondents, the railroads could be required to wait as long as fourteen, and possibly even twenty months to secure relief. At the end of that period, if the Commission finds the increased rates to be justified, the railroads may then begin charging that rate—but prospectively only. During that entire period of suspension and investigation, the railroads, unlike shippers who can be made whole by refunds or reparations, will have been deprived of substantial revenues which can never be recovered.

The *Algoma* cases which deny judicial review to shippers, who do have alternative remedies and are fully protected both by the refund rule and by entitlement to reparations, provide no support for non-reviewability of the instant Commission order imposing holddowns on selected commodities after a particularized investigation of the justness and reasonableness of rates on those commodities. Clearly, such orders are final for the purposes of judicial review. *City of Chicago* v. *United States*, 396 U.S. 162 (1969).

II. THIS CASE SHOULD BE CONSIDERED WITH THE *SEABOARD ALLIED MILLING* CASE NOW PENDIN BEFORE THIS COURT

The sole reason assigned by Respondents for contesting the reviewability of the order at issue here is that it arose in connection with a general revenue proceeding. These same respondents, however, have recently taken the position before this Court that this factor is irrelevant to the question of reviewability.

On January 8, 1979, this Court granted certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit holding that the Commission's refusal to investigate, or a decision to terminate an investigation, of a rate proposal is a reviewable order. *Southern Railway Company* v. *Seaboard Allied Milling Corp., et al.* (No. 78-575 and related Nos. 78-597 and 78-604).[3] In this case, Respondents, in support of their contention that an order imposing selective holddowns in a general increase proceeding after a particularized investigation of the justness and reasonableness of the resulting rates is not reviewable, assert that "there is a recognized distinction between review of the ordinary mechanism for seeking and obtaining increases in rail carrier rates and review of the mechanism used in this case, which is known as a 'general revenue proceeding'" (Respondents' Brief, p. 4). However, in the *Seaboard Allied Milling* case, which involved individual commodity rate increases, these same Respondents have asserted that this distinction has no bearing on reviewability:

> "The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. *This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision*" (Memorandum for the United States, p. 5, fn. 6; emphasis added).
>
> "*Asphalt* was a general revenue proceeding involving across-the-board rate increases applicable to all commodities, while the present case involved proposed rate changes limited to specified commodities. *But that distinction has no bearing on the reviewability issue*" (Petition for Writ of Certiorari in No. 78-597, p. 17; emphasis added).

[3] The Eighth Circuit decision in the *Seaboard Allied Milling* case expressly conflicts with that of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Ass'n* v. *I.C.C.*, 567 F.2d 994 (1977), holding that orders permitting railroad rates to go into effect without suspension or investigation are unreviewable.

The fact that both Respondents have denied that the difference between individual and general rate cases has any relevance to the reviewability of Commission orders in successfully seeking review of *Seaboard Allied Milling* by this Court is a clear and compelling reason why this Court should disregard Respondents' attempted reliance on such a distinction in opposing the present petition for certiorari. Indeed, Petitioners believe that certiorari should be granted and this proceeding reviewed in conjunction with the proceedings in the *Seaboard Allied Milling* case in order that this Court can clarify the scope of reviewability of the Commission's rate actions by resolving the issues presented by each of these proceedings.[4]

CONCLUSION

For the reasons stated herein and in the Petition itself, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 30, 1979

[4] Petitioners would of course comply with the briefing schedules applicable in the *Seaboard Allied Milling* case.